No. ———

In the Supreme Court of the United States

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
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HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.,
Petitioner,

v.

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

———

NIGHTTIME CONCEPTS, INC.,
Petitioner,

v.

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

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v.

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Respondent.

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Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Twenty-first Amendment strip commercial speech concerning alcohol beverages of all First Amendment protection, thereby reducing judicial scrutiny of Pennsylvania's ban on price advertising from the rigorous *Central Hudson* test to whether the ban "bear[s] a reasonable relation to the evil sought to be controlled?"

2. Does Pennsylvania's ban on price advertising for alcohol beverages violate the First Amendment, particularly where (a) the government omits its own advertising from that ban, (b) the government introduced no evidence that its ban will directly and materially advance its asserted purpose of reducing excessive consumption, and (c) the government contradictorily concluded in 1985 that price advertising for beer does not cause increased consumption?

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PETITION FOR A WRIT OF CERTIORARI

Hospitality Investments of Philadelphia, Inc. and Nighttime Concepts, Inc. respectfully petition for a writ of certiorari to review the judgments of the Supreme Court of Pennsylvania in these cases.[1]

OPINIONS BELOW

The opinions of the Supreme Court of Pennsylvania (App., *infra,* 1a-20a) are reported at —— A.2d ——, The opinions of the Court of Common Pleas of Philadelphia County (App., *infra,* 21a-28a), the Pennsylvania Liquor Control Board (App., *infra,* 29a-36a) and the Administrative Law Judge (App., *infra,* 37a-48a) are unreported.

JURISDICTION

The Supreme Court of Pennsylvania entered its judgments on November 3, 1994. *See* App., *infra,* 6a-17a, 19a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. This is a Rule 12.2 petition involving three related cases decided together by the Supreme Court of Pennsylvania.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . ."

The Twenty-first Amendment to the United States Constitution provides, in relevant part, that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

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[1] Hospitality Investments of Philadelphia, Inc. and Nighttime Concepts, Inc. are both Pennsylvania corporations. Neither corporation has a parent company or any subsidiaries.

Section 4-498(a) of the Pennsylvania Liquor Code, Pa. Stat. Ann. tit. 47, § 4-498(a) (1969 & Supp. 1994), provides, in relevant part, that "[n]o manufacturer, wholesaler, retailer or shipper . . . and no licensee under this act shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordial, wine or distilled liquor offered for sale in this Commonwealth . . . ." Section 4-498(b) further provides that "[a]ny person who violates any of the provisions of this section commits a misdemeanor . . . ."[2]

STATEMENT

The Supreme Court of Pennsylvania held that the Twenty-first Amendment supplants the First Amendment when commercial speech concerns alcohol beverages. Declining to apply the *Central Hudson* test to its review of Section 4-498, the Court instead upheld Pennsylvania's ban on price advertising by applying a rational basis test.

Respondent, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), is responsible for enforcing the Pennsylvania Liquor Code. App., *infra*, 2a. Petitioners are holders of restaurant liquor licenses issued by the Pennsylvania Liquor Control Board ("Liquor Board"). On three occasions during 1989 and 1991, the Bureau charged petitioners with violating Section 4-498 of the Liquor Code by advertising in newspapers the prices of alcohol beverages offered for sale at petitioners' bars. *Id.* at 37a, 41a, 45a. No suggestion has ever been made that the advertisements were false or misleading. The three citations gave rise to these three separate cases that were decided together by the Pennylvania courts.[3]

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[2] Pennsylvania Statutes Annotated, Title 47, § 4-498 is reproduced in full in the Appendix. App., *infra*, 49a.

[3] Citations to the records in the three cases before the Supreme Court of Pennsylvania are abbreviated as parenthetically indicated: *Pennsylvania State Police, Bureau of Liquor Control Enforcement*

A. The Legislative History of Section 4-498 and its Predecessor Regulation

The government asserts that the purpose of its restriction on price advertising is to prevent excessive consumption of alcohol beverages. *Hospitality II* 47a. But the co-sponsor of the bill that became Section 4-498 urged its passage based on a completely different purpose: "If we are ever going to put these Beer Worlds of Pennsylvania [a large beer discounter] out of existence, the ones that are wrecking our small distributors, this is the way to do it; curb their advertising." Pa. Senate, Legis. J., June 17, 1987, App., *infra*, 89a; *see id.* at 91a; *Hospitality I* 55a. Indeed, the authenticity of the "excessive consumption" purpose is belied by the government's omission of its own price advertising from the ban.

Under Pennsylvania law, the exclusive retail seller of wine and distilled spirits for off-premises consumption is the Liquor Board through the State Liquor Stores. *See* Pa. Stat. Ann. tit. 47, § 3-305. As petitioners pointed out below, the ban on price advertising contained in Section 4-498 does not include the Liquor Board among the entities subject to the ban. *Hospitality II* 66a; Brief of Appellee, *Hospitality I*, at 14.

Even if the government intended its ban on price advertising to cause a reduction in excessive consumption, neither the legislative history of Section 4-498, nor the record in these cases, contains any evidence of that alleged

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v. Hospitality Investments of Philadelphia, Inc., 1994 WL 643906 (No. 77 E.D. 1992) (Pa. Nov. 3, 1994) ("*Hospitality I* ——a"); *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Nighttime Concepts, Inc.*, 1994 WL 643907 (No. 78 E.D. 1992) (Pa. Nov. 3, 1994) ("*Nighttime* ——a"); and *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc.*, 1994 WL 643922 (No. 80 E.D. 1992) (Pa. Nov. 3, 1994) ("*Hospitality II* ——a").

causal connection. *See* App., *infra,* 86a-97a. To the contrary, the government expressly concluded in 1985 that no such causal connection exists when it decided to rescind Section 13.41(a), the predecessor regulation to Section 4-498. Section 13.41(a) required that advertisements placed by "[m]anufacturers, importing distributors and distributors of malt or brewed beverages . . . make no direct or indirect reference to the price . . ." at which those beverages are offered for sale. 40 Pa. Code § 13.41(a). In rescinding Section 13.41(a), the Liquor Board concluded that since beer advertising is generally allowed in Pennsylvania, "the addition of price advertising would not itself stimulate additional consumption or abuse." Order Adopting Regulations (Pa. Liquor Cont. Bd., Sept. 4, 1985) ("Liquor Board Order"), App., *infra,* 78a. Similarly, as petitioners noted below (*Hospitality I* 44a-45a), the Attorney General of Pennsylvania also concluded that the ban on beer price advertising should be rescinded because, *inter alia,* "Excessive Consumption Of Beer Will Not Result."[4] App., *infra,* 51a. The economist retained by the Attorney General was able to reach a "firm conclusion on this point" because (1) "[s]tates allowing price advertising had no higher rates of consumption than states prohibiting it," (2) "[t]he demand for beer is inelastic meaning a decrease in price will not bring about a corresponding increase in consumption," and (3) "[t]he price inelasticity for beer has been proven by other studies." *Id.* at 55a (citations omitted).

The Liquor Board and the Pennsylvania Attorney General made several other noteworthy findings in connection with the rescission of Section 13.41(a). Both concluded that consumers benefit by being informed of alcohol

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[4] *Report to the Pennsylvania Liquor Control Board on Beer Price Advertising* (Pa. Commw. Office of Att'y Gen. Antitrust Section 31, 1985) ("Attorney General's Report"). App., *infra,* 50a. Although the Attorney General's Report itself was not part of the record before the Pennsylvania Supreme Court, it was specifically identified and its conclusions described by petitioners in the record. *Hospitality I* 44a-45a.

beverage prices. Liquor Board Order, App., *infra,* 81a; Attorney General's Report, App., *infra,* 53a-54a. The Attorney General stated that past economic studies "support the proposition that price advertising will result in lower prices to consumers." Attorney General's Report, App., *infra,* at 53a (citations omitted).

In addition, the Attorney General concluded that, even if the asserted concerns about increased consumption had merit, "there are less restrictive alternatives to respond to these concerns than the total prohibition of price advertising," such as "increasing the awareness of the consequences of alcohol abuse" and "tighter enforcement of existing safeguards." *Id.* at 57a-58a. Pennsylvania's most obvious existing safeguard is its law that prohibits licensees and State Liquor Stores from providing alcohol beverages to any person "visibly intoxicated," to "habitual drunkards," or to "persons of known intemperate habits." Pa. Stat. Ann. tit. 47, § 4-493(1). Pennsylvania also prohibits licensees from furnishing alcohol beverages to minors. *Id.* Further, Pennsylvania prohibits licensees or State Liquor Stores from offering anything of value to consumers to induce them to purchase alcohol beverages. Pa. Stat. Ann. tit. 47, § 4-493(24). Neither the legislative history of Section 4-498, nor the record in these cases, contains any evidence that the government considered tighter enforcement of existing laws, education or any other alternatives to reduce excessive consumption that would have been less restrictive on commercial speech.

B. Proceedings Below

All three cases started with evidentiary hearings before an Administrative Law Judge ("ALJ") concerning the Bureau's citation of petitioners for violating Section 4-498. The parties did not dispute that petitioners' advertisements identified the price of alcohol beverages and, therefore, violated Section 4-498. Although petitioners argued in both *Hospitality I* and *Nighttime* that enforcement of Section 4-498 was impermissible under the First Amend-

ment, the ALJ correctly stated that she lacked jurisdiction to hold the statute unconstitutional. App., *infra,* 43a, 47a. Pursuant to Section 4-471 of the Pennsylvania Liquor Code, Pa. Stat. Ann. tit. 47, § 4-471, the ALJ imposed fines on petitioners for violating Section 4-498. App., *infra,* 40a, 44a, 47a.

Petitioners appealed to the Liquor Board, which affirmed the ALJ's decisions. App., *infra,* 31a, 33a, 35a. Petitioners again pressed their First Amendment argument in *Hospitality I* and *Nighttime,* but the Liquor Board too correctly stated that it lacked jurisdiction to decide the issue.[5]

Petitioners then appealed to the Court of Common Pleas on the ground that Section 4-498 violates their commercial speech rights guaranteed by both the Pennsylvania and United States Constitutions. In a single oral ruling that applied to all three cases, the Court held Section 4-498 unconstitutional under the Pennsylvania Constitution, and did not reach the First Amendment issue. App., *infra,* 21a, 23a, 28a. The Bureau's appeal from that ruling to the Commonwealth Court of Pennsylvania was transferred to the Supreme Court of Pennsylvania, which has exclusive jurisdiction of cases where the Court of Common Pleas has held a statute unconstitutional.

The Supreme Court of Pennsylvania reversed in an opinion issued in *Hospitality I, id.* at 1a-16a, and incorporated by reference in *Hospitality II* and *Nighttime, id.* at 17a, 19a. The Pennsylvania Court expressly rejected petitioners' argument that Section 4-498's ban on their truthful price advertising must be scrutinized pur-

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[5] Given that the ALJ and the Liquor Board lacked jurisdiction to decide the First Amendment issue, the fact that petitioner did not raise it in *Hospitality II* did not constitute a waiver. Rather, the constitutional argument was preserved for appeal to the courts of Pennsylvania, *see Bunch v. Pennsylvania State Board of Auction Examiners,* 620 A.2d 578, 581 (Pa. Commw. Ct. 1993), *appeal denied,* 642 A.2d 488 (Pa. 1994), where it was raised.

suant to the First Amendment principles set forth in *Central Hudson Gas and Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980) ("*Central Hudson*") and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) ("*Virginia Pharmacy*"). *Id.* at 3a. Instead, the court ruled that because petitioners' commercial speech concerns alcohol beverages, Pennsylvania's regulation of that speech is "governed initially by the Twenty-first Amendment to the United States Constitution which repealed prohibition." *Id.*

The Pennsylvania Court then created an unprecedented test for evaluating the constitutionality of restrictions on commercial speech that concerns alcohol beverages: "[r]estrictions may be imposed so long as they bear a reasonable relation to the evil sought to be controlled." *Id.* at 4a. Applying this test, the court held, based on no evidence whatsoever, that "it is reasonable to accept that banning price advertising is *prima facie* consonant" with the purpose of restraining alcohol consumption. *Id.* The court added that restrictions on petitioners' speech are particularly justified because the "acquisition of a liquor license is a privilege and not a right." *Id.*

The Pennsylvania Court stated that its rejection of the "careful balancing of competing interests as is usually done in free speech cases" was "clinch[ed]" by three decisions of this Court that implicate both the Twenty-first and First Amendments, *California v. LaRue*, 409 U.S. 109 (1972) ("*LaRue*"), *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) ("*Bellanca*"), and *City of Newport, Ky. v. Iacobucci*, 479 U.S. 92 (1986) ("*Iacobucci*"). App., *infra*, 5a. Although the Pennsylvania Court recognized that those cases did not involve commercial speech, it nonetheless found them controlling because they involved "live sexual entertainment or nude dancing," forms of expression that in the Pennsylvania Court's unsupported view are "usually ac-

corded greater protection" than commercial speech. *Id.* The Pennsylvania Court asserted that this Court's Twenty-first Amendment discussions in *LaRue, Bellanca* and *Iacobucci* (*"LaRue, et al."*) required it to accord Section 4-498 an "added presumption of validity" and to apply a "reasonable relationship" test to uphold the constitutionality of Pennsylvania's price advertising ban. *Id.* at 6a.

In dissent, Justice Castille refuted the majority's reliance on the Twenty-first Amendment, stating that "the [United States] Supreme Court has repeatedly affirmed the principle that neither the text nor the history of the Twenty-first Amendment suggests that it in any way limits the exercise of established individual constitutional rights." *Id.* at 8a (citations omitted). He explained that *LaRue, et al.* "merely stand for the proposition that the states have sufficient police power under the Twenty-first Amendment to override the relatively weak First Amendment interests of those providing sexually provocative entertainment in a facility operating with a liquor license." *Id.* at 10a (citations omitted). As to the majority's assertion that "live, sexually-explicit entertainment is generally accorded greater constitutional protection than commercial speech," Justice Castille concluded that it "profoundly misinterprets federal caselaw." *Id.* at 11a n.3.

Justice Castille emphasized that restrictions on commercial speech must be carefully scrutinized under the four-prong test originally set forth in *Central Hudson. Id.* at 12a. He explained that the government failed to meet its burden under the third prong of that test, because "it offered no empirical evidence or any other evidence" to prove that its ban on alcohol price advertising directly and materially advances its asserted goal of reducing excessive consumption.[6] *Id.* Justice Castille also noted that

[6] Justice Castille's numbering of the four prongs of the *Central Hudson* test differs from this Court's traditional numbering, which is used in this Petition. Justice Castille's first prong is the tra-

petitioners had offered evidence to the contrary. *Id.* at 13a. Turning to the fourth prong, Justice Castille stated that the government "failed to argue, much less prove, that the regulation is written or applied no more restrictively than necessary to achieve its asserted interest." *Id.*

Justice Castille concluded his dissent:

> The majority opinion simply goes too far in sustaining the challenged regulation without an analysis of the free speech protections afforded the licensee under the First Amendment of the federal constitution . . . . Commercial free speech warrants more protection than the majority is willing to confer.

Id. at 14a.[7]

REASONS FOR GRANTING THE PETITION

The federal and state courts substantially conflict as to whether the Twenty-first Amendment affects the level of judicial scrutiny of state-imposed restrictions on truthful, non-misleading alcohol beverage advertising. The Pennsylvania Court's unprecedented holding that the Twenty-first Amendment strips such advertising of all First Amendment protection is erroneous. Had the Pennsylvania Court applied any meaningful First Amendment test to Section 4-498, it would have necessarily found it an impermissible restriction on commercial speech. Moreover, the constitutional rights at stake in these cases are important, and the Twenty-first Amendment issue has direct bearing on similar state-imposed restrictions and pending lawsuits.

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ditional third prong, and his third prong is the traditional fourth prong. There is no difference between the substance of the test as described by Justice Castille and as it appeared originally in *Central Hudson.*

[7] A second dissenting opinion based on the Pennsylvania Constitution, not the federal Constitution, was filed by Justice Flaherty. App., *infra,* 15a-16a.

I. THE PENNSYLVANIA COURT'S UNPRECEDENTED HOLDING THAT THE TWENTY-FIRST AMENDMENT ELIMINATES FIRST AMENDMENT PROTECTION FOR COMMERCIAL SPEECH CONCERNING ALCOHOL BEVERAGES AGGRAVATES THE EXISTING SPLIT OF AUTHORITY IN THE FEDERAL AND STATE COURTS

No court has ever gone as far as the Pennsylvania Court's declaration that the Twenty-first Amendment overrides all First Amendment protection for commercial speech concerning alcohol beverages. Nonetheless, there is a growing split of authority in the federal and state courts concerning what impact, if any, the Twenty-first Amendment has on the First Amendment's protection of such speech. The only realistic prospect for resolving that conflict is a decision from this Court.

A majority of the 13 judges of the Fifth Circuit who considered this issue *en banc* expressly rejected the argument that the Twenty-first Amendment weakens the First Amendment's protection of alcohol beverage advertising. *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 755 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984) ("*Dunagin*") (five dissenting judges incorporating prior panel opinion that the Twenty-first Amendment does "not change the standard of review" for restrictions on commercial speech, 701 F.2d 314, 330); *id.* at 753-54 (two concurring judges rejecting expansion of Twenty-first Amendment as "mischievous and insidious").[8]

Similarly, the Michigan Court of Appeals held in *Michigan Beer and Wine Wholesalers Association v. Attorney General*, 370 N.W.2d 328, 335 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986) ("*Michigan Beer*"),

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[8] The *Dunagin* court upheld the constitutionality of Mississippi's intrastate liquor advertising ban, but only the plurality opinion, adopted by a six-judge minority, relied on the Twenty-first Amendment.

that the "Twenty-first Amendment does not require us to deal with restraints on freedom of speech any differently than we would if alcoholic beverages were not involved." *See also Wise v. Tennesee Alco. Bev. Comm'n,* No. 81-325-I, *slip op.* at 10-11 (Tenn. Ct. App., Apr. 13, 1982) (unanimous opinion declaring alcohol advertising ban unconstitutional under Tennessee Constitution; expressing skepticism in *dicta* that the Twenty-first Amendment "has any significant effect" upon the exercise of commercial speech rights under the First Amendment), App., *infra,* 107a-108a.

The three courts that have held—erroneously in our view—that the Twenty-first Amendment reduces commercial speech rights not only directly conflict with the *Dunagin* majority and *Michigan Beer,* but also substantially disagree with each other as to the extent of that reduction. The Pennsylvania Court stands alone in holding that the Twenty-first Amendment completely overrides the First Amendment, and that the intermediate scrutiny of *Central Hudson* must be replaced by a "reasonable relationship" test. The other two courts that have relied on the Twenty-first Amendment at least purport to apply *Central Hudson,* but they differ as to how that test should be altered where commercial speech concerns alcohol beverages. *See 44 Liquormart, Inc. v. Rhode Island,* 39 F.3d 5 (1st Cir. 1994), *petition for cert. filed* (U.S. Dec. 27, 1994) (No. 94-1140); *Oklahoma Telecasters Ass'n v. Crisp,* 699 F.2d 490, 499-500 (10th Cir. 1993) ("*Oklahoma Telecasters*"), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691 (1984). The *44 Liquormart* court appeared to rely on the Twenty-first Amendment solely to relax its scrutiny under the third prong—whether the restriction on speech directly and materially advances the asserted governmental interest. 39 F.3d at 8. In *Oklahoma Telecasters,* the court stated that the Twenty-first Amendment required it to give added deference to the government not only under the third prong, but also the second prong—whether the asserted

governmental interest is substantial—*and* the fourth prong —whether the restriction is no more extensive than necessary to serve the asserted interest.[9] 699 F.2d at 499-502.

The Pennsylvania Court's decision to deprive petitioners' truthful price advertising of all First Amendment protection simply because it concerns alcohol beverages lies at one extreme of a wide range of irreconcilable federal and state court opinions. This Court should grant certiorari to review and resolve these important conflicts.

II. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA IS ERRONEOUS

A. The Twenty-first Amendment Does Not Deprive Truthful Alcohol Price Advertising of All First Amendment Protection

Since *Virginia Pharmacy*, this Court has consistently held that commercial speech is a valued component of the

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[9] As purported support for its expansion of the Twenty-first Amendment, the *Oklahoma Telecasters* court mistakenly relied on this Court's summary dismissal "for want of a substantial federal question," in the appeal from *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio) ("*Queensgate*"), *appeal dismissed*, 459 U.S. 807 (1982). There, the Supreme Court of Ohio upheld a much narrower ban than Section 4-498: the challenged regulation permitted all off-premises price advertising unless it referred to "price advantage." *Queensgate*, 433 N.E.2d at 139 n.1. The precedential effect of summary dismissals is limited to "the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Plainly, the *Oklahoma Telecasters* court read too much into this Court's dismissal in *Queensgate*, because the jurisdictional statement did not even mention the Twenty-first Amendment. *See Oklahoma Telecasters*, 699 F.2d at 496-97. Similarly, the Ohio Court only cited the Twenty-first Amendment when discussing whether the State had the power generally to regulate alcohol beverage advertising, not whether the particular regulation satisfied the third and fourth prongs of *Central Hudson*. *See Queensgate*, 433 N.E.2d at 141-42.

national discourse, entitled to First Amendment protection. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1511 (1993) ("*Discovery Network*"). Protection of commercial speech stems from recognition of its unique role in the development of consumer awareness in a free enterprise economy. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993) ("*Edenfield*"); *Virginia Pharmacy*, 425 U.S. at 761-62. Two seminal commercial speech decisions, *Virginia Pharmacy* and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) ("*Bates*"), struck down price advertising bans like Section 4-498. Disregarding this Court's precedents, the Pennsylvania Court incorrectly held that Section 4-498's ban on price advertising receives no First Amendment scrutiny solely because it was purportedly adopted pursuant to Pennsylvania's Twenty-first Amendment power. App., *infra*, 6a.

But "the [Twenty-first] Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984) ("*Capital Cities*") (citations omitted). Instead, " 'the Amendment primarily created an exception to the normal operation of the Commerce Clause.' " *Id.* (citation omitted). "Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful . . . . 'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.' " *Craig v. Boren*, 429 U.S. 190, 206 (1976) (citation omitted). Accordingly, this Court has held repeatedly that the Twenty-first Amendment does not alter the customary judicial analysis of governmental restrictions on individual constitutional rights. *See id.* at 207 (equal protection rights); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (First Amendment establishment clause rights); *Wiscon-*

sin v. Constantineau, 400 U.S. 433, 436 (1971) (due process rights).

The Court has created a narrow exception to this principle where States prohibit simulated sexual acts, nudity or topless dancing on premises licensed to sell alcohol, noting that the Twenty-first Amendment confers in that context an "added presumption in favor of the validity of the state regulation." *LaRue,* 409 U.S. at 118; *see Iacobucci,* 479 U.S. at 97; *Bellanca,* 452 U.S. at 718. In his dissenting opinions, Justice Stevens has criticized even that narrow exception as "blatantly incorrect," *id.* at 725: "[n]either the plain language nor a fair construction of the purpose of the Twenty-first Amendment lends any support to the Court's holding that the Twenty-first Amendment shields restrictions on speech from full First Amendment review." *Iacobucci,* 479 U.S. at 97.

The Pennsylvania Court has unsupportably expanded the narrow exception set forth in *LaRue, et al.* Those cases are not relevant because (1) the statutes challenged in each were an exercise of core Twenty-first Amendment power to regulate the conditions for alcohol sales on licensed premises—nowhere else—and thus only indirectly regulated expressive activity, *and* (2) they involved expression (conduct, really) "only marginally" within "the outer perimeters of the First Amendment," *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566 (1991). *See Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932-33 (1975); App., *infra,* 10a (Castille, J., dissenting); Laurence H. Tribe, *American Constitutional Law* § 6-24 at 478 n.15 (2d ed. 1988). In contrast, Section 4-498 regulates pure commercial speech, not marginal expressive conduct, and prohibits price advertising everywhere *except* on licensed premises (by everyone except the Liquor Board, which is unrestricted in its price advertising).

The error of the Pennsylvania Court's expansion of *LaRue, et al.* is underscored by this Court's holding in *Capital Cities* that a State's regulation of alcohol beverage

advertising is at best a weak exercise of Twenty-first Amendment power. There, the Court struck down on federal preemption grounds Oklahoma's requirement that cable television operators delete advertisements for certain alcohol beverages when retransmitting out-of-state signals within Oklahoma. 467 U.S. at 715. The Court held that Oklahoma's interest in discouraging alcohol consumption by restricting some (but not all) advertising was "modest," and engaged "only indirectly" its core Twenty-first Amendment power "of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" *Id.* (citation omitted).

Section 4-498 actually represents an even more modest exercise of asserted Twenty-first Amendment power than Oklahoma's statute, because it omits the exclusive retailer of wine and spirits for off-premises consumption (*i.e.*, the government itself) from its ban on price advertising. Indeed, Section 4-498 is not a Twenty-first Amendment exercise at all to the extent that it was actually adopted for the purpose of economic protectionism (*see* this Petition at 4)—a purpose wholly unrelated to Pennsylvania's Twenty-first Amendment power. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). Given the Court's conclusion in *Capital Cities* that the federal interest in uniform cable industry regulation outweighed Oklahoma's modest exercise, 467 U.S. at 715-16, the constitutional values of the First Amendment must substantially outweigh Pennsylvania's even more modest Twenty-first Amendment exercise.

Various courts and judges have correctly limited *LaRue, et al.* to their facts. *Michigan Beer*, 370 N.W.2d at 334-35; *Dunagin*, 718 F.2d at 755 (five dissenting judges incorporating prior panel opinion, 701 F.2d at 326-28); *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543, 551-53 (D.R.I. 1993), *rev'd sub nom. 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994),

petition for cert. filed (U.S. Dec. 27, 1994) (No. 94-1140); App., *infra*, 9a-10a (Castille, J., dissenting); *see Dunagin*, 718 F.2d at 753-54 (concurring opinion). Further, those few opinions that have erroneously expanded *LaRue, et al.* as purportedly supporting a reduction of First Amendment protection for alcohol beverage advertising have been widely and uniformly criticized.[10]

The Pennsylvania Court has gone far beyond any other court in its unprincipled expansion of *LaRue, et al.* Under its novel "reasonable relationship" test, the States would have virtually unlimited power to restrict or ban truthful communications about a lawful product. That result is antithetical to the commercial speech doctrine: "the general rule is that the speaker and the audience, not the government, assess the value of information presented." *Edenfield*, 113 S. Ct. at 1798. Further, adoption of the ineffectual "reasonable relationship" test by other courts would intolerably "create radical disparities in First Amendment protections from State to State." *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 108 n.16 (1990) (plurality opinion). The Pennsylvania Court erred in holding that the Twenty-first Amendment trumps the First Amendment in the context of alcohol beverages.[11]

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[10] *See, e.g.*, Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 Iowa L. Rev. 909, 943 (1992); Richard S. Mandel, Note, *Liquor Advertising: Resolving the Clash Between the First and Twenty-first Amendments*, 59 N.Y.U. L. Rev. 157, 179-82 (1984); Brian S. Steffey, Recent Development, *Tension between the First and Twenty-first Amendments in State Regulation of Alcohol Advertising*, 37 Vand. L. Rev. 1421, 1448 (1984); Karen L. Sterchi, Note, *Restraints on Alcoholic Beverage Advertising: A Constitutional Analysis*, 60 Notre Dame L. Rev. 779, 799 n.70 (1985).

[11] In a further attempt to justify its "reasonable relationship" test, the Pennsylvania Court resurrected the hoary "right-privilege" distinction to argue that petitioners gave up their constitutional right to commercial speech when they were granted the "privilege" of a liquor license. App., *infra*, at 4a. But even 32 years ago,

B. The Government Failed to Meet Its Substantial Burden under *Central Hudson*

This Court's test for reviewing restrictions on commercial speech is the rigorous *Central Hudson* test, a far cry from the Pennsylvania Court's "reasonable relationship" test. *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2089 (1994). Under *Central Hudson*, "the State's burden is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful.'" *Id.* (citation omitted). If the government cannot satisfy its burden of proof on the second, third and fourth prongs of *Central Hudson*, a restriction on commercial speech cannot pass constitutional muster. *Central Hudson*, 447 U.S. at 566. The government in these cases did not create a record that satifies any part of its burden.

Under the second prong, the government asserts that the problem of excessive alcohol consumption gives rise to a substantial interest in keeping truthful price information from adults. But Section 4-498 inconsistently does not ban the government—which has a monopoly on the sale of wine and spirits for off-premises consumption—from advertising the prices of the products sold in its State Liquor Stores. "[T]he selective approach [Pennsylvania] has taken toward [alcohol price] advertising suggests limits on the substantiality of the interests it asserts here." [12] *Capital Cities*, 467 U.S. at 715.

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it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a right or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see Perry v. Sindermann*, 408 U.S. 593, 599 (1972).

[12] Apparently, the Liquor Board is concerned about the omission of its own advertising from the ban. Soon after Section 4-498 was passed, the Liquor Board stopped including prices in its advertising, although it still advertises that certain brands are "on sale." Of course, the Liquor Board is free to commence price advertising again. Its current self-restraint is irrelevant to the constitutionality of Section 4-498, which by its terms applies only to private sector participants in the alcohol beverage industry.

Indeed, Pennsylvania's selective approach reveals that its "stated interests are not the actual interests served by the restriction." *Edenfield,* 113 S. Ct. 1798 (citation omitted). As disclosed by the legislative history, the actual interest served by Section 4-498 is the protection of small beer distributors by prohibiting large discounters from advertising their lower prices. *See* Pa. Senate, Legis. J., June 17, 1987, App., *infra,* 89a, 91a. Such economic protectionism cannot qualify as a substantial interest under the second prong. *See Rice v. Alcohol Bev. Cont. Appeals Bd.,* 579 P.2d 476, 493 (Cal. 1978) ("*Rice*").

The insubstantiality of the government's asserted interest is underscored by its express recognition, through both the Liquor Board and the Pennsylvania Attorney General, that consumers benefit by being informed of alcohol beverage prices. Liquor Board Order, App., *infra,* 81a; Attorney General's Report, App., *infra,* 53a-54a. For example, price advertising helps a budget-conscious consumer locate an inexpensive bar. Moreover, "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." *Bates,* 433 U.S. at 377 (citations omitted); *see* Attorney General's Report, App., *infra,* 53a-54a (expressing same proposition in context of beer price advertising). The second prong of *Central Hudson* cannot be satisfied by the government's belief here that consumers should be "kept in ignorance." *Virginia Pharmacy,* 425 U.S. at 769; *see Central Hudson,* 447 U.S. at 574 (concurring opinion) (expressing "serious[] doubt" whether suppression of price information "is ever a permissible way for the State to 'dampen' demand" for a lawful product).

The government also failed to satisfy its burden under the third prong of *Central Hudson*:

> This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must dem-

> onstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Edenfield, 113 S. Ct. at 1800.

The government "offered no empirical evidence or any other evidence" to prove that its ban on price advertising directly and materially reduces excessive consumption of alcohol beverages. App., *infra,* 12a (Castille, J., dissenting). For this reason alone, the government failed to saitsfy the third prong. *See Ibanez,* 114 S. Ct. at 2090; *Edenfield,* 113 S. Ct. at 1800; *Michigan Beer,* 370 N.W. 2d at 336. Moreover, the government, through both the Liquor Board and the Pennsylvania Attorney General, explicitly concluded that beer price advertising does *not* cause increased consumption when it advocated rescission of Section 4-498's predecessor regulation. *See* this Petition at 4-5. This concession in 1985, coupled with the lack of any new or contrary evidence, would make a third prong argument in these cases incredible. No wonder none was offered by the government.

The Pennsylvania Court speculated that "[b]y its very nature, price advertising (typically discount price advertising) is designed to encourage consumption by promoting and increasing the sale of alcoholic beverages." App., *infra,* 4a. Such speculation is inadequate as a matter of law, *Edenfield,* 113 S. Ct. at 1800, and in conflict with the scientific evidence accepted by the government itself, *see* this Petition at 4-5. Moreover, it ignores the most obvious reason why a retailer would advertise its prices: to attract consumers to its establishment rather than a competitor's establishment, regardless of whether those consumers will drink one sip more than they would elsewhere. *See Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 39 (1966) (citing studies showing that compulsory retail price maintenance had " 'no significant effect upon the consumption of alcoholic beverages' "); *Rice,* 579 P.2d at 494 (expressing doubt that

significant relationship exists between direct price control of alcohol and excessive consumption).[13]

The government also failed to satisfy the fourth prong of *Central Hudson*, which requires it to demonstrate that its restriction is "no more extensive than necessary to serve" the asserted interest. *Ibanez*, 114 S. Ct. at 2088 (citation omitted). In determining whether the fourth prong has been met, courts must give weighty consideration to the existence of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech." *Discovery Network*, 113 S. Ct. at 1510 n.13 (city's failure to address concern about unsightly newsracks by regulating size, shape, appearance or number demonstrated that fit was not "carefully calculated"); *see New York State Ass'n of Realtors v. Shaffer*, 27 F.3d 834, 844 (2d Cir.), *cert. denied*, 115 S. Ct. 511 (1994); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1239 (E.D.N.Y. 1993) (government's failure to address its concern about excessive consumption through "sensible" alernatives that did not restrict speech, such as education, demonstarted that fit was unreasonable).

Section 4-498 must fall under the fourth prong because, as Justice Castille noted, the government "failed to argue, much less prove" that Section 4-498 is no more restrictive than necessary to reduce excessive consumption of alcohol beverages. App., *infra*, 13a. The government submitted no evidence that it considered any alternative measures to increase personal responsibility for alcohol beverage consumption. Moreover, the government, through the Pennsylvania Attorney General, expressly admitted that there are "less retrictive alternatives" to address ex-

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[13] Skepticism about the "excessive consumption" rationale was expressed even by the one co-sponsor of Section 4-498 who relied on that rationale. He admitted that "the issue is debatable," and urged passage of the bill only because "[m]any people in the Bible Belt of this state who support liquor control feel that such advertising would have an impact on the consumption of alcohol . . . ." Pa. Senate, Legis. J., June 17, 1987, App., *infra*, 88a.

cessive consumption, such as alcohol abuse education and tighter enforcement of existing laws, when it supported rescission of Section 4-498's predecessor regulation. Attorney General's Report, App., *infra,* 57a-58a; *see* this Petition at 6 (describing Pennsylvania's existing laws).

Had the Pennsylvania Court applied the *Central Hudson* test, rather than its unprecedented "reasonable relationship" test, it necessarily would have found that the government has not satisfied the second, third or fourth prong. As Justice Castille stated, the government "failed to shoulder its burden regarding even the minimum standards of analysis and substantive protection as required by the U.S. Supreme Court and the federal constitution." App., *infra,* 13a.

III. THE QUESTIONS PRESENTED RAISE IMPORTANT CONSTITUTIONAL ISSUES WITH DIRECT BEARING ON SIMILAR RESTRICTIONS AND PENDING LAWSUITS

As this Court stated in *Bates,* "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." 433 U.S. at 364. Under the Pennsylvania Court's decision, however, the First Amendment will provide no barrier to States that improperly choose to reduce or shut off altogether the flow of commercial speech concerning a major category of consumer products. The rights of alcohol beverage manufacturers, distributors and retailers to communicate truthful information to consumers, and the rights of consumers to receive that information, are too important to allow the Pennsylvania Court's decision to stand.

The questions raised here bear directly on the constitutionality of numerous restrictions on alcohol beverage advertising.[14] Indeed, the Twenty-first Amendment

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[14] *See, e.g.,* Ark. Alco. Bev. Cont. Div. Regs. § 3.17 (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ark.] ¶ 4217 at 7247

issue is currently being litigated in three additional cases. First, a petition for a writ of certiorari is pending in the *44 Liquormart* case, based, *inter alia*, on the following question: "Does the Twenty-first Amendment weaken the protection the First Amendment affords truthful, non-misleading price advertising by relieving the state of the burden to prove that its restriction on speech directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest?" Second, in *Bentsen v. Coors Brewing Co.*, No. 93-1631 (U.S. Apr. 15, 1994), *cert. granted*, 114 S. Ct. 2671 (Jun. 13, 1994), which was argued before this

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(1994) (prohibiting advertising of discount sales); Conn. Dep't of Liquor Const. Regs. § 30-6-A40 (1976) *reprinted in* Liquor Cont. L. Rep. (CCH) [Conn.] ¶ 6034H at 10,221 (limiting price advertising); Ga. Alco. Bev. Code § 560-2-4-.15 (1994) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ga.] ¶ 4158 at 13,244 (prohibiting price advertising by "off-premise" licensees except within the establishment); Kan. Stat. Ann. § 41-714(2) (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [Kan.] ¶¶ 7236-38 at 18,427 (prohibiting retailers from billboard advertising); Minn. Liquor Cont. Div. Regs. § 7515.0760(2) (1985) *reprinted in* Liquor Cont. L. Rep. (CCH) [Minn.] ¶ 4038(2) at 25,222 (banning price advertising except in windows and premises of licensed establishments); Mo. Div. of Liquor Cont. Regs. § 11 CSR 70-2.240(18) (1986) *reprinted in* Liquor Cont. L. Rep. (CCH) [Mo.] ¶ 4142G(18) at 27,232 (prohibiting manufacturers and wholesalers from price advertising); N.H. Rev. Stat. Ann. § 179:51 (1992) *reprinted in* Liquor Cont. L. Rep. (CCH) [N.H.] ¶ 7251 at 31,429-30 (prohibiting listing of retail prices by a wholesaler on behalf of a distributor); N.C. Admin. Code tit. 4, r. 2R.1008(c)(2) (1984) *reprinted in* Liquor Cont. L. Rep. (CCH) [N.C.] ¶ 4448(c)(2) at 35,254 (prohibiting "on-premise" licensees from advertising the brand name of any alcohol beverage); Ohio Rev. Code Ann. § 4301.211 (Anderson 1989) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ohio] ¶ 7172A at 37,419 (prohibiting price advertising for malt beverages except within the licensed establishment); R.I. Gen. Laws § 3-8-7 (1987) *reprinted in* Liquor Cont. L. Rep. (CCH) [R.I.] ¶ 7210 at 41,423-3 (prohibiting price advertising for alcohol beverages except within the licensed establishment); S.C. Alco. Bev. Cont. Comm'n § 7-34 (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [S.C.] ¶ 4034 at 42,212 (prohibiting retailers from price advertising).

Court on November 30, 1994, the government explicitly contended that the Twenty-first Amendment affords an "added presumption" of constitutional validity to its law banning the disclosure of alcohol strength on malt beverage labels.[15] Brief for the Petitioner at 41-47. Third, an appeal is pending in the Fourth Circuit from the district court's decision upholding Baltimore's ban on billboard advertising for alcohol beverages. *Anheuser-Busch, Inc. v. Mayor & City Council of Baltimore,* Nos. 94-1431, 1432 (4th Cir. May 31, 1994). There, a municipality is arguing that the Twenty-first Amendment reduces First Amendment protection for the restricted speech to a "rational basis" test. Brief of Appellees at 17-18.

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[15] Unlike these cases, *Coors* does not squarely present the issue of the tension between the First and Twenty-first Amendments. As the respondent in *Coors* explained, the Court may reject the government's argument for the simple reason that the Twenty-first Amendment by its terms applies only to the States, and the labeling prohibition is a *federal* law.

CONCLUSION

The state and federal courts are divided on what impact, if any, the Twenty-first Amendment has on the First Amendment rights of the entire alcohol beverage industry. In its unprecedented decision, the Supreme Court of Pennsylvania erroneously held that the Twenty-first Amendment strips that major national industry of all First Amendment protection for its commercial speech. The cases on this important constitutional issue have been proliferating, and more litigation is likely given that many States have imposed similar restrictions on alcohol beverage advertising. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

FILED

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OFFICE OF THE CLERK

HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.,
Petitioner,

v.

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

NIGHTTIME CONCEPTS, INC.,
Petitioner,

v.

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

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Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

J-197-1993

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Appellant

v.

HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.,
Appellee

No. 77 Eastern District Appeal Docket 1992

Appeal from the Order of the Court of
Common Pleas of Philadelphia County,
Entered at No. 9104-3255, Civil Division,
on July 23, 1991

SUBMITTED: October 18, 1993

OPINION OF THE COURT

MR. JUSTICE PAPADAKOS DECIDED: NOVEMBER 3, 1994

This appeal arises from a finding by the Court of Common Pleas of Philadelphia County that Section 498 of the Pennsylvania Liquor Code, 47 P.S. § 4-498, is unconstitutional. This is an appeal as of right directly to this Court, as authorized by 42 P.S. § 722(7), since, under that section we have exclusive jurisdiction of appeal from final orders of courts of common pleas in cases

where such a court has held any statute to be unconstitutional. For the reasons set forth below, we reverse.

Appellant, the Bureau of Liquor Control Enforcement ("Bureau"), is responsible for enforcing the Pennsylvania Liquor Code, 47 P.S. § 1-101, et seq. Appellee (hereinafter the "Licensee") is the holder of a restaurant liquor license issued by the Pennsylvania Liquor Control Board ("Board"). In late 1989, the Bureau issued a citation against the Licensee charging a violation of Section 498 of the Liquor Code. Section 498 prohibits a licensee from advertising in any manner whatsoever the price of any malt beverage, cordial, wine or distilled liquor offered for sale in this State. A hearing relative to the citation was held before an administrative law judge and the following fact was stipulated. A bureau enforcement officer read the Licensee's advertisement in the October 26, 1989, edition of the daily Pennsylvania paper. The advertisement stated, in part: "$1.00 Regular Drinks 9-12 midnight." The Licensee admitted that its ad violated Section 498. The only argument that the Licensee raised was that Section 498 was unconstitutional.

The administrative law judge who heard the case found that the Licensee had violated Section 498 and she imposed a fine of $250.00 for this violation. She also found that she had no jurisdiction to address the constitutional issue. The Pennsylvania Liquor Control Board affirmed. The Licensee appealed to the Court of Common Pleas of Philadelphia County and oral argument was held on July 23, 1991. At that argument, the Licensee contended that the Bureau failed to establish that the policy behind the price advertising prohibition of Section 498 outweighed its constitutional right to commercial free speech. The trial judge accepted this argument and, by order dated July 23, 1991, granted the Licensee's appeal and reversed the order of the Board. On June 26, 1992, the trial judge issued a one page memorandum opinion concluding that Section 498 violated the Pennsylvania Con-

stitution. The trial judge otherwise noted that his reasoning appeared on the record.[1]

The Bureau appealed to the Commonwealth Court and the matter was subsequently transferred to this Court pursuant to our exclusive jurisdiction under 42 P.S. § 722 (7), as noted above.

The Licensee herein argues that its right to commercial free speech as guaranteed under the First Amendment to the United States Constitution, is set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *Virginia Pharmacy Board v. Virginia Citizen Consumer Counsel, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Pennsylvania State Board of Pharmacy v. Pastor*, —— Pa. ——, 272 A.2d 487 (1971).[2] However, none of those cases involved the sale of alcohol or alcoholic beverages. The sale or consumption of alcohol or alcoholic beverages in this country is governed initially by the Twenty-First Amendment to the United States Constitution which repealed prohibition. Regulation of the sale and consumption of alcohol is left to the state under that amendment. A state has the power to ban the purchase and sale of alcoholic beverages within its borders. The manufacture, gift, purchase, sale, possession or transportation of alcoholic beverages may be prohibited. However, once having granted to its citizens the privilege of selling and buying alcoholic beverages, the state cannot impose restrictions which strangle the trade. Restrictions may be imposed so long as they bear a reasonable relation to the evil sought to be controlled.

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[1] A review of the record shows that the Judge's few remarks are inadequate and contain no reference to any section of the Pennsylvania Constitution.

[2] The Pennsylvania Constitution's guarantee of free speech is involved in the *Pastor* decision.

In *Tahiti Bar, Inc. Liquor License Case,* 395 Pa. 355, 150 A.2d 112, *appeal dismissed,* 361 U.S. 85, 80 S.Ct. 159, 4 L.Ed.2d 116 (1959), this Court held that an individual has no constitutionally protected *right* to engage in the business of selling alcoholic beverages. Rather, the authority to sell alcoholic beverages is a *privilege* granted by the State. Accordingly, a state may impose conditions and limitations on that privilege. We held that regulation of the liquor business is required only to bear a *reasonable* relation to the evil sought to be controlled. Since an individual who accepts the privilege of holding a liquor license is deemed to consent to the conditions and restrictions attached to that license, the usual tests, still applicable in other situations and used to evaluate constitutional challenges, are not involved. See also, *Replogle v. Commonwealth, Pa. Liquor Control Board,* 514 Pa. 209, 523 A.2d 327 (1987).

It is clear here that Section 498, which prohibits price advertising of alcoholic beverages, is reasonably related to permissible goals of the legislature in the area of alcohol control. The Bureau argues, and we have no reason to doubt their contention, that Section 498, along with other sections of the Liquor Code, is intended to restrain and discourage the consumption of alcoholic beverages. This is a legitimate legislative purpose. It is reasonable to accept that banning price advertising is *prima facie* consonant with such a purpose. By its very nature, price advertising (typically *discount* price advertising) is designed to encourage consumption by promoting and increasing the sale of alcoholic beverages. A string of witnesses or statistical studies are not needed to prove this point. In short, we find that Section 498 bears a reasonable relation to legitimate legislative goals in the area of alcohol control and since this is so, the incidental curtailment of the right of commercial free speech is justified where acquisition of a liquor license is a privilege and not a right. A careful balancing of competing interests as is usually done in free speech cases is not required.

Three United States Supreme Court cases in the area of liquor license control clinch the argument. In *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 390 (1972); *New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 1981); and *City of Newport, Ky. v. Iacobucci,* 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986), the United States Supreme Court was faced with a challenge to a local liquor licensing law or regulation prohibiting live sexual entertainment or nude dancing in establishments licensed to sell liquor. In each case, the court rejected the licensees' arguments based on the free speech guarantees of the First and Fourteenth Amendments and the court did not engage in the traditional First Amendment analysis. Rather, the relevant liquor regulation was held not to be irrational (*LaRue*); was held to be a valid attribute of the state's power to ban the sale of alcoholic beverages entirely (*Bellanca*); or was held to be presumptively valid (*Iacobucci*).

The case instantly before this Court involves a restriction on commercial speech as implicated in the enforcement of the Liquor Code and we do not intend to deprecate the importance of the constitutionally protected right to commercial speech in appropriate cases. Although neither *LaRue, Bellanca* nor *Iacobucci* involved such a restriction, the applicability of those cases to the case *sub judice* is most compelling because commercial speech is generally accorded less protection than other forms of expression. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, supra.* It seems unnecessary to apply a rigorous First Amendment analysis where a liquor regulation is attacked on commercial speech grounds when such an analysis has not been utilized relative to speech which is usually accorded greater protection. The United States Supreme Court has held that "the Twenty-first Amendment shields restrictions on speech from full First Amendment review." *Iacobucci,* 479 U.S. at 97.

In conclusion, upon carefully reviewing *LaRue, Bellanca* and *Iacobucci*, two points stand out. First, the Twenty-First Amendment gives a state broad authority and, hence, there is an "added presumption of validity" when the state regulates in the area of liquor sales. Second, the reasonable relationship test is relevant to determining constitutionality. Constitutionally protected speech may be restricted because the law in question is related to the regulation of liquor.

Accordingly, we find Section 498 to be a valid exercise of Pennsylvania's right to regulate the sale and consumption of alcohol. The order of the Court of Common Pleas of Philadelphia County is reversed.

MR. JUSTICE FLAHERTY files a Dissenting Opinion.

MR. JUSTICE CASTILLE files a Dissenting Opinion.

MR. JUSTICE MONTEMURO is sitting by designation.

Judgment entered
Dated: November 3, 1994

/s/ Patricia Johnson
PATRICIA JOHNSON
Chief Clerk
Supreme Court of Pennsylvania
Eastern District

DISSENTING OPINION

MR. JUSTICE CASTILLE DECIDED: Noverber 3, 1994

I respectfully dissent. The majority opinion cites to *In re Tahiti Bar, Inc.*, 395 Pa. 355, 150 A.2d 112 (1959), to support its theory that since an individual who accepts the privilege of holding a liquor license is deemed to consent to the conditions and restrictions attached to that license, the usual tests, still applicable in other areas and used to evaluate constitutional challenges, are not involved. The majority opinion goes on to assert that the Twenty-first Amendment to the United States Constitution allows the Commonwealth to substantially regulate liquor advertisement in Pennsylvania without meaningful regard for the free speech interests of those engaged in the business. The majority opinion asserts that because the U.S. Supreme Court in *Newport v. Iacobucci,* 479 U.S. 92 (1986), *New York State Liquor Authority v. Bellanca,* 452 U.S. 714 (1981) and *California v. La Rue,* 409 U.S. 109 (1972) failed to engage in a First Amendment analysis for challenges to local liquor licensing regulations prohibiting live sexual entertainment in establishments licensed to sell liquor, then no First Amendment analysis is required here for a regulation limiting pure commercial speech ("[i]t seems unnecessary to apply a rigorous First Amendment analysis where a liquor regulation is attacked on commercial speech grounds when such analysis has not been utilized relative to speech which is usually accorded greater protection (i.e., live, sexually-explicit entertainment)." Majority Opinion at 6). The majority opinion would have the Court uphold the challenged regulation merely because it is reasonably related to the regulation of liquor.

Restrictions on commercial speech, however, are generally much more rigorously scrutinized than the majority opinion seems willing to concede. Commercial speech, such as advertising, has been given substantial protection under the First Amendment to the U.S. Constitution and

under Article 1, Section 7 of the Pennsylvania Constitution. *See, e.g., Virginia Pharmacy Bd. v. Virginia Consumer Council,* 425 U.S. 748 (1976); *Insurance Adjustment Bureau v. Insurance Commissioner,* 518 Pa. 210, 542 A.2d 1317 (1988). A constitutional free speech analysis, then, is likewise required of us in the instant matter.

Prior to 1976, *Tahiti Bar, supra,* was in keeping with the traditional view that purely commercial advertising was not entitled to any First Amendment protection and could therefore be subjected to governmental regulation in the same way as any other type of business activity. *See Valentine v. Chrestensen,* 316 U.S. 52 (1942) (the Constitution imposes no restraint on government with respect to commercial advertising). However, after the U.S. Supreme Court expressly extended rigorous First Amendment protection to commercial speech in its 1976 *Virginia Pharmacy* decision, *supra,* the proposition asserted by this Court's 1959 *Tahiti Bar* decision that regulation of the liquor business is required only to bear a reasonable relation to the evil sought to be controlled is therefore constitutionally suspect in the instant context. To the extent *Tahiti Bar* is not in accordance with U.S. Supreme Court caselaw, it should be overruled. In short, a careful reading of that federal caselaw makes clear that there is little basis to follow the majority opinion's abandonment of the constitutional analysis in which this Court would otherwise engage but for the implication of the Twenty-first Amendment.

First, the Supreme Court has repeatedly affirmed the principle that neither the text nor the history of the Twenty-first Amendment suggests that it in any way limits the exercise of established individual constitutional rights where the sale or use of liquor is concerned. *Craig v. Boren,* 429 U.S. 190 (1976) (equal protection rights not limited by the implication of the Twenty-first Amendment); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971)

(the Twenty-first Amendment does not permit a state to regulate alcohol consumption at the expense of procedural due process). Indeed, the Twenty-first Amendment was intended simply to insulate state regulation of liquor from potential federal Commerce Clause objections: "[o]nce passing beyond consideration of the Commerce Clause the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." *Craig* at 205-06. Further, in the cases cited by the majority opinion (*La Rue, Iacobucci* and *Bellanca, supra*), the Twenty-first Amendment served only to buttress the states' standing to regulate live, explicitly sexual entertainment at establishments licensed to dispense liquor; the Twenty-first Amendment did not function in those cases to enhance the states' ability to curtail expressly protected contitutional rights. *Id.* at 207 (distinguishing *La Rue, supra*).[1]

Second, the U.S. Supreme Court has never expressly evaluated the impact of the Twenty-first Amendment on the constitutional validity of state-imposed limitations on liquor advertising. Therefore, the majority's analysis in the instant case is supported only by very rough analogy to *La Rue, Iacobucci* and *Bellanca, supra.* Moreover, the majority opinion misinterprets the application of the

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[1] The other cases upon which the majority relies (*Iacobucci* (1986) and *Bellanca* (1981), *supra*), in no way undermine this notion that the Twenty-first Amendment is not an independent repository of state power to abridge established First Amendment protections. Like *La Rue*, the U.S. Supreme Court cases *Iacobucci* and *Bellanca* merely involved state regulation of live sexual entertainment taking place in liquor establishments. Therefore, the *Craig* Court's assertion that *La Rue* did nothing to enhance the states' power to curtail explicitly protected constitutional rights pursuant to the Twenty-first Amendment is still valid today.

Moreover, although this Court expressly upheld the regulation of lewd, immoral or improper entertainment on licensed premises in *Tahiti Bar, supra*, that decision is not strictly in accordance with the U.S. Supreme Court's commercial speech caselaw. *See* discussion *supra.*

Twenty-first Amendment in those cases. *La Rue, Iacobucci* and *Bellanca, supra,* merely stand for the proposition that the states have sufficient police power under the Twenty-first Amendment to override the relatively weak First Amendment interests of those providing sexually provocative entertainment in a facility operating with a liquor license. *See Bellanca,* 452 U.S. at 718 (whatever artistic or communicative value may attach to topless dancing is overcome by the state's exercise of its broad power arising under the Twenty-first Amendment). *See also Hude v. Commonwealth,* 55 Pa. Commw. 1, 423 A.2d 15 (1980) (liquor regulation preventing the use of a loudspeaker whereby the sound of the music emanating therefrom can be heard on the outside of liquor-licensed premises did not operate to breach freedom of expression in that the enjoyment of loud music in a tavern is not a fundamental right of free expression).[2]

In none of those federal cases did the Supreme Court rely exclusively on the state's authority under the Twenty-first Amendment to uphold the challenged regulations. Notwithstanding this fact, however, the majority opinion in the instant matter asserts the validity of the challenged regulation precisely because it is reasonably related to the Commonwealth's authority to regulate liquor commerce pursuant to the Twenty-first Amendment. Furthermore, the regulations in *La Rue, Iacobucci* and *Bellanca, supra,* functioned primarily only as conditions upon the sale of alcohol that only incidentally burdened expression. The challenged regulation in the instant case, however, directly targets otherwise constitutionally-protected expression itself. The regulations in the cases cited by the majority sought to burden conduct containing only a minimal communicative element: i.e., live, sexually explicit entertain-

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[2] *Hude* is significant because it highlights the notion that in liquor control cases, Pennsylvania courts must first determine the inherent value of the speech at issue and then evaluate whether the state's authority to regulate liquor commerce is sufficient to override that particular class of speech.

ment. *See Craig* at 207 (distinguishing *La Rue* as a case where conduct consisted "more of gross sexuality than of communication"). In the instant case, however, the challenged regulation seeks to suppress constitutionally protected commercal information, or "pure" speech.[3]

Accordingly, the regulation in the instant case should be analyzed no differently than are other governmental burdens on commercial speech. *See Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,* 478 U.S. 328 (1986) (applying customary commercial speech standards to casino gambling advertising.) In *Insurance Adjustment Bureau, supra,* this Court analyzed a commercial speech constitutional challenge to an amendment to the public adjuster and public adjuster solicitor law prohibiting solicitation of business by public adjusters or public adjuster solicitors within 24 hours of a disaster or fire. The Court developed a method of analysis by which it first scrutinized the challenged regulations pursuant to the minimum standards of analysis and substantive protection as required by the U.S. Supreme Court and the federal constitution. *Id.* at 215, 542 A.2d at 1319. The Court then examined whether the resolution of the particular issue in question is more appropriately treated pursuant to the Pennsylvania constitution or the United States Constitution. *Id.*[4]

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[3] The majority opinion's assertion that live, sexually-explicit entertainment is generally accorded greater constitutional protection than commercial speech profoundly misinterprets federal caselaw. *See* Brian S. Steffey, *Recent Development: Tension Between the First and Twenty-first Amendments in State Regulation of Alcohol Advertising,* 37 Vand. L. Rev. 1421, 1448 (1984).

[4] The Court determined that Article I, Section 7 of the Pennsylvania constitution does not allow the prior restraint or other restriction of commercial speech by any governmental agency where the legitimate, important interests of government may be accomplished practicably in another, less intrusive manner. *Id.* at 225, 542 A.2d at 1324. The Court applied that standard to strike down

Proceeding with the *Insurance Adjustment Bureau* Court's method of analysis, the First Amendment requires that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, n.20 (1999) [*sic*]. The First Amendment also requires courts to subject state limitations on commercial speech to an intermediate standard of review and uphold those limitations only if the state carries its burden of proving that (1) the challenged regulation directly advances (2) a substantial governmental interest (3) in a way that is no more restrictive than necessary to achieve that objective. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Conceding the second prong of the test that the Commonwealth has a substantial interest in promoting the public health, safety and welfare, the Commonwealth in the instant case must first have shown that the advertising limitation at issue directly advances that interest. To succeed, the Commonwealth must have demonstrated that its ban on advertising the price of any malt beverage, cordial, wine or distilled liquor directly reduces the consumption of such liquor and, thereby, the evils associated with such consumption. To satisfy the third prong of the *Central Hudson* test, the Commonwealth must have shown that the regulation is written or applied no more restrictively than necessary to achieve its asserted interest.

In the instant case, however, a review of the record shows that the Commonwealth merely made the bald assertion that a ban on advertising liquor prices reduces the consumption of such liquor; it offered no empirical evidence or any other evidence to buttress its argument. As such, the Commonwealth failed to carry its burden on the first prong of the *Central Hudson* test. On the other hand, the licensee challenging the regulation offered evi-

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the prohibition of solicitation of business by public adjusters or public adjuster solicitors within 24 hours of a disaster or fire as violative of Pennsylvania constitutional free speech protections. *Id.*

dence to the contrary, showing that there is no direct link between liquor advertising bans and reduced liquor consumption. Moreover, the Commonwealth failed to argue, much less prove, that the regulation is written or applied no more restrictively than necessary to achieve its asserted interest. As such, the Commonwealth failed to carry its burden on the third prong of the *Central Hudson* test as well.

In short, the Commonwealth failed to shoulder its burden regarding even the minimum standards of analysis and substantive protection as required by the U.S. Supreme Court and the federal constitution. Accordingly, at a minimum, this case should be remanded back to the trial court to allow the Commonwealth to develop the record, if it can, with evidence that (1) a ban on advertising liquor prices directly reduces the consumption of such liquor and (2) the regulation is written or applied no more restrictively than necessary to achieve its asserted interest.

Moreover, the litigants should utilize the analytical tool defined by this Court in *Commonwealth v. Edmunds,* 526 Pa. 374, 586 A.2d 887 (1991) in order to allow the trial court to thoroughly determine whether the resolution of the particular issue in question is more appropriately treated pursuant to the Pennsylvania constitution or the United States constitution. Accordingly, the litigants should brief and analyze (1) the text of Article I, Section 7 of Pennsylvania constitution; (2) the history of that provision; (3) relevant caselaw from Pennsylvania and from other jurisdictions regarding commercial speech and state regulation of liquor advertising; (4) policy considerations, including unique issues of state and local concern; and (5) the impact on modern Pennsylvania jurisprudence. *Id.* at 390, 586 A.2d at 895. If indeed the Pennsylvania constitution should protect the speech at issue in the instant matter more stringently than does the federal constitution, the consideration of that proposition should be thoroughly analyzed.

The majority opinion simply goes too far in sustaining the challenged regulation without an analysis of the free speech protections afforded the licensee under the First Amendment of the federal constitution or under Article I, Section 7 of the Pennsylvania constitution. Commercial free speech warrants more protection than the majority wishes to confer.

DISSENTING OPINION

MR. JUSTICE FLAHERTY DECIDED: NOVEMBER 3, 1994

I dissent. The majority holds that a state has the power under the Twenty-first Amendment to the United States Constitution to regulate the sale and consumption of alcohol; that there is no constitutional right to engage in the business of selling alcoholic beverages; that the state may impose reasonable conditions and limitations on the sale of alcoholic beverages; and that "the usual tests" concerning the constitutional validity of these conditions and limitations are not involved because "an individual who accepts the privilege of holding a liquor license is deemed to consent to the conditions and restrictions attached to the license." Since discouraging consumption of alcoholic beverages is a legitimate legislative purpose, and since banning price advertising "bears a reasonable relation to legitimate legislative goals," any curtailment of free speech which results, the majority reasons, is "justified where acquisition of a liquor license is a privilege and not a right."

While it is true that there may be no federally protected right of commercial speech on the facts of this case under the First Amendment to the United States Constitution, it is equally certain under our decision in *Insurance Adjustment Bureau v. Insurance Commissioner* that there are rights under Article I, Section 7 of the Pennsylvania Constitution:

> We hold, therefore, that the Pennsylvania Constitution, Article I, Section 7, will not allow the prior restraint or other restriction of commercial speech by *any* governmental agency where the legitimate, important interests of government may be accomplished practicably in another, less intrusive manner.

518 Pa. 210, 225, 542 A.2d 1317, 1324 (1988)[1] (Emphasis added.) This holding is relevant to a consideration of the majority's view that the statute at issue in this case is reasonably related to a legitimate governmental purpose. In Pennsylvania, the reasonableness of the relationship between the statute and the governmental purpose must be answered within the context of the protections the Pennsylvania Constitution provides to commercial speech. And those protections, in a word, are that any regulation restricting commercial speech must involve legitimate, important governmental interests and that there must be no less intrusive way practically to protect those interests.

Moreover, there is no presumption of validity of a liquor regulation or any governmental regulation which restricts commercial speech. In *Insurance Adjustment Bureau*, we stated:

> We note our agreement with the Bureau that in cases involving the constitutional challenge to a restriction on commercial speech which is not false or deceptive, "The party seeking to uphold a restriction of commercial speech carries the burden of justifying it."

Id. at 219, n.5, 542 A.2d 1321, n.5. (Citations omitted.)

Thus, I would remand the case for a determination of whether the Commonwealth has met *its* burden of justifying its regulation of commercial speech by establishing that there is no less intrusive way in which its legitimate and important purpose practically can be achieved.

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[1] Article I, Section 7 provides, in pertinent part:

> The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Appellant,

v.

NIGHTTIME CONCEPTS, INC.,
Appellee.

Submitted Oct. 18, 1993

Decided Nov. 3, 1994

Appeal No. 78, Eastern District Appeal Docket 1992 from the Order of the Court of Common Pleas of Philadelphia County, Entered at No. 9104-3256, Civil Division, on July 23, 1991

Before NIX, C.J., and FLAHERTY, ZAPPALA, PAPADAKOS, CAPPY, CASTILLE and MONTEMURO, JJ.

ORDER

PER CURIAM.

The order of the Court of Common Pleas of Philadelphia County is REVERSED. *See, Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc.*, —— Pa. ——, —— A.2d —— (1994), (slip opinion filed at No. 77 E.D. Appeal Docket 1992, on November 3, 1994).

FLAHERTY, Justice, dissenting.

I dissent based on my dissenting opinion filed in *Pennsylvania State Police, Bureau of Liquor Control Enforce-*

ment v. Hospitality Investments of Philadelphia, Inc., —— Pa. —— (No. 77 E.D. Appeal Docket 1992).

CASTILLE, Justice, dissenting.

I respectfully dissent based on my dissenting opinion filed in *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc.* (No. 77 E.D. Appeal Docket 1992).

SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Appellant,

v.

HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.,
Appellee.

Submitted Oct. 18, 1993

Decided Nov. 3, 1994

Appeal No. 80 Eastern District Appeal Docket 1992
from the Order of the Court of Common Pleas of
Philadelphai County, Entered at No. 9203-3772,
Civil Division, on May 11, 1992

Before NIX, C.J., and FLAHERTY, ZAPPALA, PAPADAKOS, CAPPY, CASTILLE and MONTEMURO, JJ.

ORDER

PER CURIAM.

The order of the Court of Common Pleas of Philadelphia County is REVERSED. *See, Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc.*, —— Pa. ——, —— A.2d —— (1994), (slip opinion filed at No. 77 E.D. Appeal Docket 1992, on November 3, 1994).

FLAHERTY, Justice, dissenting.

I dissent based on my dissenting opinion filed in *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc.*, —— Pa. —— (No. 77 E.D. Appeal Docket 1992).

CASTILLE, Justice, dissenting.

I respectfully dissent based on my dissenting opinion filed in *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc.* (No. 77 E.D. Appeal Docket 1992).

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

No. 9203-3772

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT

v.

HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.

MEMORANDUM

AVELLINO, J.

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("PSP") has appealed from my order dated May 11, 1992, which granted the appeal of Hospitality Investments of Philadelphia, Inc. ("Hospitality").

This case was transferred to me from Judge Edward Bradley, because it involved an issue that I had previously decided which is currently on appeal to the Commonwealth Court. That issue is whether Section 498 of the Liquor Code, 47 P. S. § 4-498, which prohibits the advertising of liquor prices, violates the Pennsylvania Constitution. In *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Phila., Inc.*, Commonwealth Court No. 1861 C.D. 1991, I decided that the statute was invalid and that ruling is controlling here.

Because the reasons for my decision appear of record in the aforementioned case, N. T. 26-31, July 23, 1991,

and because the record in this case is mercifully brief, I won't bother filing a formal opinion. *See* Pa. R. App. P. 1925 (sparing common pleas from having to file formal opinions).

BY THE COURT:

/s/ Bernard J. Avellino

Dated: 6-26-92

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

No. 9104-3255

No. 9104-3256

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT

v.

HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.

and

NIGHTTIME CONCEPTS, INC.

MEMORANDUM

AVELLINO, J.

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("PSP") has appealed from my orders dated July 23, 1991, which granted the statutory appeals of Hospitality Investments of Philadelphia, Inc. ("Hospitality") and Nighttime Concepts, Inc. ("Nighttime").

The Hospitality and Nighttime cases involved the same issue, namely, whether or not Section 498 of the Liquor Code, 47 P. S. § 4-498 ("Section 498"), which prohibits the advertising of liquor prices, contravenes the Pennsylvania Constitution. On July 23, 1991, I entertained argument and, after contemplating the question over the lunch hour, concluded that Section 498 was, in fact, invalid.

Because the reasons for my decision appear of record, N. T. 26-31, and because the record in these cases is mercifully brief, I won't bother filing a formal opinion. *See* Pa. R. App. P. 1925 (sparing common pleas from having to file formal opinions when the reasons for a ruling appear of record).

BY THE COURT:

/s/ Bernard J. Avellino

Dated: 6-26-92

LCB APPEALS: CITATIONS

No. 9104-3255
No. 9104-3256

HOSPITALITY INVESTMENTS and NIGHTTIME CONCEPTS

vs.

P.S.P.

JULY 23, 1991

HONORABLE BERNARD AVELLINO [*]

ROOM 904

FIVE PENN CENTER

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* * * *

[26] THE COURT: I thought about cases number 1 and 2 and I am ready to make a ruling. I had an opportunity to review the Supreme Court decision in the Pharmacy Board case. And there are two things about the case that I think are worth mentioning. First and most importantly the Supreme Court decided to base its decision upon the Pennsylvania constitution as opposed to the federal constitution. As the court suggested very plainly I think, Pennsylvania probably provides all of us

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[*] Petitioner has reproduced the Court Reporter's original text, without edits.

with more rights and more process than the federal constitution does. I'm happy about that. I'm happy about that.

The second comment I want to make is that by making its decision under the Pennsylvania constitution, there is no higher authority on this subject. This decision is binding upon you. It's simply beyond the scope of any other court to reverse or modify a federal decision on the same subject. It is simply unthinkable. The federal courts have no authority to interpret the Pennsylvania constitution.

Thirdly, intriguingly I mentioned this because Gary posited his argument on First Amendment grounds. At the time the Pharmacy case was decided by the Pennsylvania Supreme Court, commercial speech, [27] if I can use that expression, was generally regarded as being beyond the pale of the First Amendment. It was simply not protected. Commercial speech was not protected. The doctrine of commercial free speech began to evolve, I believe, in the mid 70's in the United States Supreme Court.

Perhaps for that reason the Pennsylvania Supreme Court conducted a routine due process inquiry. It simply examined the regulations prohibiting the pharmacists throughout Pennsylvania from telling the public the price of which they were prepared to sell prescription drugs. Took that regulation and simply compared it to the purposes for which it was ostensibly designed. The regulatory board had no reasonable relationship to those purposes. At least none that was worth mentioning. None that could outweigh the benefit to the consumers. The court stressed the consumers. I think the consumers are stressed in the federal cases that deal with commercial free speech.

The Bates decision, for example, which authorized the lawyers to advertise their prices and so on all stressed the consumer in this calculus, this complicated constitutional calculus or scrutiny to which a law is subjected. The court gave the [28] example. I happen to be using the

A.2d citation because that's the one that Gary had given me. He gave an example at page 494 in the A.2d. in court of a survey that showed that the prices for the same 30 capsules of a well known antibiotic may range from 79 cents to $7.45. Gave that by way of an illustration.

I only mention that to emphasize that the court does care about consumers. It does care about consumers. I think the analogy is complete. I think it's fair to draw principles from this case and apply them to the prices of liquor. I think it's fair because the same controls are in place. The licensee like the pharmacist is heavily regulated. He is looked at in every conceivable direction.

It is illegal, for example, for a licensee to serve more of a beverage regardless of its price to a person than a person can fairly consume. By that I mean the licensee may never serve a person who is visibly intoxicated. The same prohibitions apply to a pharmacist in that he or she may not give out drugs without a prescription. So for these reasons I do think the analogy is a very fair analogy.

Having said all of this, let me approach if I can just for a moment the First Amendment argument. The argument has been made and rejected at least with [29] two cases that I know of dealing with liquor. The Ohio Supreme Court upheld a restriction analogous to this one, the one in Pennsylvania: prohibition against off-site pricing. And also the Fifth Circuit in a 1983 decision, Dunagin v. City of Oxford, 518, A.2d [*sic*] 738, 1983. This is the 5th Circuit. Examined Mississippi statutes against a First Amendment inquiry. It concluded the Mississippi statutes are analogous in the sense that they prohibited—actually they went beyond pricing. There were certain things. They included the prohibition against price advertising as well. The court concluded that those statutes could withstand a First Amendment analysis.

This decision, of course, made under the federal constitution whereas the decision of the Pharmacy Board case was made under the Pennsylvania constitution. I should

have mentioned, perhaps, that the Pharmacy court case is hardly surprising in the sense that it goes off and finds more protection in the Pennsylvania constitution than are found in the federal constitution. I think that's true almost across the board. I can think of countless illustrations in matters of privacy.

For example, the Pennsylvania constitution [30] provides a great deal more privacy than you and I are entitled to under the federal decisions. The federal decisions are babies as compared to the Pennsylvania decisions on that subject. I could go on and on and on, but I think I've said enough to explain the reasons for my decision. I'm only the appellate court. I cannot afford the luxury of spending nine months or the rest of my career addressing those decisions. This is the best decision I can make. I made it. Now we will go onto the next case.

MR. DIVITO: I may have missed something. You've upheld the ALJ?

THE COURT: No.

MR. DIVITO: I wasn't clear. I'm sorry.

THE COURT: I'm bound by the Pharmacy decision. I'm going to strike the statute. I just wanted to address the First Amendment argument you made briefly by saying that the federal—it's been made in one state case that I know of in Ohio and in one federal case that I know of, the Fifth Circuit in 1984. Each time it failed. As near as I can tell, the United States Supreme Court has never addressed the subject. It had an opportunity to address it in the Ohio case, but in substance declined to entertain the case. It simply denied to entertain the case. [31] It said in substance it was not a substantial question. It's almost inmaterial. It just doesn't happen.

(Off the record discussion occurs.)

(Proceeding adjourned.)

Mailing Date: March 11, 1992

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124

Case No: 91-0519

PENNSYLVANIA STATE POLICE
BUREAU OF LIQUOR CONTROL ENFORCEMENT

VS.

HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.
1701 LOCUST STREET
PHILADELPHIA, PA 19103

License No: R-AP-6205

OPINION

Hospitality Investments of Philadelphia, Inc. (Licensee), appealed from the Opinion and Order of Administrative Law Judge Tania E. Wright (ALJ), wherein the ALJ sustained the Citation and imposed a fine of Four Hundred Dollars ($400.00).

Count 1 charged the Licensee with violation of Sections 471 and 493(24) of the Liquor Code [47 P.S. §§ 4-471 and 4-493(24)] and Section 5 of the Pennsylvania Human Relations Act [43 P.S. § 955] in that on November 14, 1990, the Licensee by its servants, agents or employes, offered and/or gave inducements to certain persons by allowing them privileges not permitted to the general public. Finding a violation, the ALJ imposed a fine of Two Hundred Dollars ($200.00).

Count 2 charged the Licensee with violation of Section 498 of the Liquor Code [47 P.S. § 4-498] in that on November 14, 1990, the Licensee by its servants, agents or employes, advertised or permitted the advertising in any manner whatsoever, the price at which alcoholic beverages would be sold. Finding a violation, the ALJ imposed a fine of Two Hundred Dollars ($200.00).

Pursuant to Section 471 of the Liquor Code [47 P.S. § 4-471], the Appeal in this case must be based solely on the record before the ALJ. Where the decision of the ALJ is based upon substantial evidence, the Board must affirm the decision.

The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion, requiring something more than a scintilla creating mere suspicion of the fact to be established. McCauley vs. Pennsylvania Board of Probation and Parole, 98 Pa. Cmwlth. 28, 510 A.2d 877 (1986); Chapman vs. Pennsylvania Board of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

The facts in this case were stipulated as follows: On November 21, 1990, a Pennsylvania State Police, Bureau of Liquor Control Enforcement (Bureau) officer reviewed an advertisement which appeared in the Philadelphia Daily News on November 14, 1990. The advertisement read: "Attention Hy Lit fans. Every Wednesday for the first time in Center City, Legendary Radio Personality Hy Lit will be appearing at Polo Bay tonight. No cover and 50 cent drinks for the ladies, 10 to 12 midnight." The name, location and phone number of the Licensee's premises were noted in the advertisement.

The Appeal of the Licensee lacks any specificity, attacking generally the ALJ's decision. The record, as stipulated, is clear that the Licensee committed sex discrimination by offering inducements (no cover charge and discounting the price of drinks), wthout offering these

same privileges to men in violation of the Pennsylvania Human Relations Act. Finally, it is beyond question that liability attaches to Count 2 for directly advertising the price at which drinks would be sold.

The ALJ's decision was supported by substantial evidence, and is correct as a matter of law.

ORDER

The decision of the ALJ is affirmed.

The Appeal of the Licensee is dismissed.

The Licensee is ordered to pay a fine of Four Hundred Dollars ($400.00) within twenty (20) days of the mailing date of this Order. Failure to do so will result in a suspension or revocation of this license with Bond Forfeiture.

Licensee must adhere to all other conditions set forth in the ALJ's Order.

/s/ John Allen Reilly
Board Secretary

Mailing Date: April 5, 1991

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124

Case No.: 90-0160

PENNSYLVANIA STATE POLICE
BUREAU OF LIQUOR CONTROL ENFORCEMENT

VS

NIGHTTIME CONCEPTS, INC.
600 SPRING GARDEN STREET
PHILADELPHIA, PA 19123

License No.: R-2039

OPINION

Nighttime Concepts, Inc. (Licensee), appealed the Opinion and Order of Administrative Law Judge Tanya E. Wright (ALJ), wherein the ALJ sustained the Citation, and imposed a Fine of Two Hundred Dollars ($200.00).

Licensee was charged with violation of Section 498 of the Liquor Code [47 P.S. § 4-498] in that on October 19, 1989, Licensee, by its servants, agents, or employes, advertised or permitted advertising in any manner whatsoever the price at which alcoholic beverages would be sold.

Pursuant to Section 471 of the Liquor Code [47 P. S. § 4-471], the Appeal in this case must be based solely on the record before the ALJ. Where the decision of the

ALJ is based upon substantial evidence, the Board must affirm the decision.

The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion, requiring something more than a scintilla creating mere suspicion of the fact to be established. McCauley vs. Pennsylvania Board of Probation and Parole, 98 Pa. Cmwlth. 28, 510 A.2d 877 (1986); Chapman vs. Pennsylvania Board of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

In its Appeal, Licensee generally argues that the decision of the ALJ was contrary to the weight and sufficiency of the evidence, and contrary to law. At the hearing, Licensee's counsel argued that Section 498 constituted an abridgment of the Licensee's First Amendment rights of commercial free speech.

This Board does not have the power and authority to constitutionally interpret its own statutes and regulations. Notwithstanding, Section 468(d) specifically provides that the license is a privilege and not a property right, the latter conferring expanded constitutional rights. Moreover, the ALJ was correct in holding that promoting consumption through off-premise advertising is inconsistent with the purpose of the Liquor Code in restraining the sale of liquor. Pennsylvania Liquor Control Board vs. Borough Food Systems, Inc., 508 A.2d 1308 (1986).

ORDER

The decision of the ALJ is affirmed.

The Appeal of the Licensee is dismissed.

The Licensee has paid the fine of Two Hundred Dollars ($200.00).

Licensee must adhere to all other conditions set forth in the ALJ's Order.

/s/ John Allen Reilly
Board Secretary

Mailing Date: April 8, 1991

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124

Case No.: 89-2488

PENNSYLVANIA STATE POLICE
BUREAU OF LIQUOR CONTROL ENFORCEMENT

vs.

HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.
1701 Locust Street
Philadelphia, PA 19103

License No.: R-6205

OPINION

Hospitality Investments of Philadelphia, Inc. (Licensee), appealed the Opinion and Order of Administrative Law Judge Tanya E. Wright (ALJ), wherein the ALJ sustained the Citation and imposed a Fine of Two Hundred and Fifty Dollars ($250.00).

Licensee was charged with violation of Section 498 of the Liquor Code [47 P.S. § 4-498] in that on October 26, 1989, Licensee, by its servants, agents or employees, advertised or permitted advertising in any manner whatsoever the price at which alcoholic beverages would be sold.

Pursuant to Section 471 of the Liquor Code [47 P. S. § 4-471], the Appeal in this case must be based solely

on the record before the ALJ. Where the decision of the ALJ is based upon substantial evidence, the Board must affirm the decision.

The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion, requiring something more than a scintilla creating mere suspicion of the fact to be established. McCauley vs. Pennsylvania Board of Probation and Parole, 98 Pa. Cmwlth. 28, 501 A.2d 877 (1986); Chapman vs. Pennsylvania Board of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

In its Appeal, Licensee generally argues that the decision of the ALJ was contrary to the weight and sufficiency of the evidence, and contrary to law. At the hearing, Licensee's counsel argued that Section 498 constituted an abridgement of the Licensee's First Amendment rights of commercial free speech.

This Board does not have the power and authority to constitutionally interpret its own statutes and regulations. Notwithstanding, Section 468(d) specifically provides that the license is a privilege and not a property right, the latter conferring expanded constitutional rights. Moreover, the ALJ was correct in holding that promoting consumption through off-premise advertising is inconsistent with the purpose of the Liquor Code in restraining the sale of liquor. Pennsylvania Liquor Control Board vs. Borough Food Systems, Inc., 508 A.2d 1308 (1986).

ORDER

The decision of the ALJ is affirmed.

The Appeal of the Licensee is dismissed.

The Licensee is ordered to pay a fine of Two Hundred Fifty Dollars ($250.00) within Twenty (20) days of the mailing date of this Order. Failure to do so will result

in a suspension or revocation of this license with Bond Forfeiture.

Licensee must adhere to all other conditions set forth in the ALJ's Order.

/s/ John Allen Reilly
Board Secretary

Mailing Date: July 18, 1991

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR PENNSYLVANIA LIQUOR CONTROL BOARD

Citation No. 91-0519

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT

v.

HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.
1701 Locust Street
Philadelphia, PA 19103
Philadelphia County

License No. R-AP-6205

BEFORE: WRIGHT, J.

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on March 12, 1991, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau of Enforcement") against Hospitality Investments of Philadelphia, Inc., License Number R-AP-6205 (hereinafter "Hospitality Investments").

An Administrative hearing was held on Tuesday, May 7, 1991, pursuant to requisite and appropriate hearing

notice. The parties stipulated to the service and receipt of the notice letter and the citation, and to the summary of the facts.

The citation contains two counts.

The first count charges "Hospitality Investments" with violation of Sections 471 and 493(24) of the Liquor Code, 47 P.S. Sections 4-471 and 4-493(24) and Section 5 of the Pennsylvania Human Relations Act, 43 P.S. Section 955, in that on November 14, 1990, "Hospitality Investments," by its servants, agents or employes, offered and/or gave inducements to certain persons by allowing them privileges not permitted the general public.

The second count charges "Hospitality Investments" with violation of Section 498 of the Liquor Code, 47 P.S. Section 4-498, in that on November 14, 1990, "Hospitality Investments," by its servants, agents or employes, advertised or permitted the advertising in any manner whatsoever the price at which alcoholic beverages would be sold.

COUNT NOS. 1 AND 2

FINDINGS OF FACT:

1. On November 21, 1990, Enforcement Officer Samuel Yurich reviewed an advertisement which appeared in the Philadelphia Daily News on November 14, 1990. The advertisement read, "Attention Hy Lit fans. Every Wednesday for the first time in Center City, Legendary Radio Personality Hy Lit will be appearing at Polo Bay tonight. No cover and 50¢ drinks for the ladies, 10 to 12 midnight." (N.T. 4 and Exhibit B-3).
2. The name, location and phone number for the licensed premises was noted in the ad (N.T. 4 and Exhibit B-3).

CONCLUSIONS OF LAW:

Count No. 1—On November 14, 1990, "Hospitality Investments," by its servants, agents or employes, offered inducements to certain persons by allowing them privileges not permitted the general public, in violation of Sections 471 and 493(24) of the Liquor Code, 47 P.S. Section 4-471 and 4-493(24) and Section 5 of the Pennsylvania Human Relations Act, 43 P.S. Section 955.

Count No. 2—On November 14, 1990, "Hospitality Investments," by its servants, agents or employes, advertised or permitted the advertising of the price at which alcoholic beverages would be sold, in violation of Section 498 of the Liquor Code, 47 P.S. Section 4-498.

PRIOR RECORD:

According to information received from the PSP, Bureau of Liquor Control Enforcement, as provided by the PLCB, Bureau of Licensing, of which we hereby take administrative notice, "Hospitality Investments" was first licensed on March 15, 1988, and has had no record of prior offenses.

DISCUSSION:

This license was first issued on March 15, 1988. Under the circumstances of this case, the "Bureau of Enforcement" recommended a monetary fine. That recommendation shall be accepted by the Court.

PENALTY:

Section 471 of the Liquor Code, 47 P. S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than $50.00 nor more than $1,000.00, or both, for violations of the type found in this case.

Therefore, penalties shall be assessed as follows:

Count No. 1—$200.00.

Count No. 2—$200.00.

Accordingly, we issue the following

ORDER

THEREFORE, it is hereby ordered that Licensee, Hospitality Investments of Philadelphia, Inc., License Number R-AP-6205, pay a fine of Four Hundred Dollars ($400.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, Licensee's license shall be suspended or revoked and the bond forfeited.

The fine must be paid by Treasurer's Check, Cashier's Check or Certified Check. Personal Checks are not acceptable. Make check payable to the Commonwealth of Pennsylvania and mail to:

PLCB—Office of Administrative Law Judge
2973 Jefferson Street, Suite A
Harrisburg, PA 17110-2119

Dated this 9th day of July, 1991.

/s/ Tania E. Wright
TANIA E. WRIGHT, J.

Mailing Date: Jan. 28, 1991

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR PENNSYLVANIA LIQUOR CONTROL BOARD

Citation No. 90-0160

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT

v.

NIGHTTIME CONCEPTS, INC.
600 Spring Garden Street
Philadelphia, PA 19123
Philadelphia County

License No. R-2039

BEFORE: WRIGHT, J.

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on January 31, 1990, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau of Enforcement") against Nighttime Concepts, Inc., License Number R-2039 (hereinafter "Nighttime").

An Administrative hearing was held on Thursday, October 4, 1990, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation, and to the summary of the facts.

The citation charges "Nighttime" with violation of Section 498 of the Liquor Code, 47 P.S. Section 4-498, in that on October 19, 1989, "Nighttime," by its servants, agents or employes, advertised or permitted the advertising in any manner whatsoever the price at which alcoholic beverages would be sold.

FINDINGS OF FACT:

1. On October 19, 1989, an ad appeared for the licensed premises in a local newspaper. The ad read, in part, "ALL BEVERAGES $1" (N.T. 4 and Exhibit B-3).

CONCLUSIONS OF LAW:

On October 19, 1989, "Nighttime," by its servants, agents or employes, advertised or permitted the advertising of the price at which alcoholic beverages would be sold, in violaton of Section 498 of the Liquor Code, 47 P.S. Section 4-498.

PRIOR RECORD:

According to information received from the PSP, Bureau of Liquor Control Enforcement, as provided by the PLCB, Bureau of Licensing, of which we hereby take administrative notice, "Nighttime" was first licensed on September 9, 1988, and has had no record of prior offenses.

DISCUSSION:

Counsel for licensee argues that Section 498 of the Liquor Code constitutes an abridgement of the licensee's First Amendment rights of commercial free speech, both under the United States Constitution and the Pennsylvania Constitution. Counsel argues that the licensee has a constitutionally protected right to advertise prices, and that Section 498 is an abridgement of that right. He further argues that it has no rational basis or connection to the health and welfare of the general public, such that it

would exempt the state statute from constitutional scrutiny.

Section 498 of the Liquor Code prohibits advertising in any manner whatsoever the price of any malt, beverage, cordial wine or distilled liquor offered for sale in Commonwealth. This Section does not apply to price, signs or tags attached to or placed on merchandise for sale within the premises. Further, Section 498(c) specifically exempts licensees from the provision of this section where advertisement is done in trade journals which are duly recognized and authorized by the Board.

In a decision by a panel of Administrative Law Judges, *State Street Beer and Soda Discounters, Inc.,* Citation Nos. 88-1972 and 88-2538 (as consolidated), Judge Thau indicates that the restriction of price advertising was born out of a belief that price advertising promoted consumption. *See The Legislative Journal—Senate,* June 17, 1987 p.p. 759-761. Promoting consumption of alcohol is inconsistent with the purpose of the Liquor Code, which is to regulate and restrain the sale of liquor. *See P.L.C.B. v. Burrell Food Systems, Inc.,* 508 A.2d 1308 (1986). The twenty-first Amendment to the Constitution conferred on the state's extensive authority relative to public health, welfare and morals. The legislature deemed it appropriate to exercise this power by prohibiting the advertisement of prices of alcoholic beverages.

This Court does not presume to have the authority to find the statute unconstitutional. The language of the statutory provision is clear and unequivocable as it is written, and the licensee is in clear violation. Therefore, a penalty shall be imposed.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribed a penalty of suspension or revocation of license or imposition of a fine of not less than $50.00 nor more than $1,000.00, or both, for violations of the type found in this case.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby ordered that Licensee, Nighttime Concepts, Inc., License Number R-2039, pay a fine of Two Hundred Dollars ($200.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, Licensee's license shall be suspended or revoked and the bond forfeited.

The fine must be paid by Treasurer's Check, Cashier's Check or Certified Check. Personal Checks are not acceptable. Make check payable to the Commonwealth of Pennsylvania and mail to:

PLCB—Office of Administrative Law Judge
2973 Jefferson Street, Suite A
Harrisburg, PA 17110-2119

Dated this 16th day of January, 1991.

/s/ Tania E. Wright
TANIA E. WRIGHT, J.

Mailing Date: Jan. 10, 1991

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR PENNSYLVANIA LIQUOR CONTROL BOARD

Citation No. 89-2488

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT

v.

HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.
1701 Locust Street
Philadelphia, PA 19103-6118
Philadelphia County

License No. R-6205

BEFORE: WRIGHT, J.

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on December 19, 1989, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau of Enforcement") against Hospitality Investments of Philadelphia, Inc., License Number R-6205 (hereinafter "Hospitality Investments").

An Administrative hearing was held on Thursday, October 4, 1990, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and re-

ceipt of the notice letter and the citation, and to the summary of the facts. However, licensee's counsel argued that the facts did not rise to a violation of the law based on constitutional defects in the statute.

The citation charges "Hospitality Investments" with violation of Section 498 of the Liquor Code, 47 P.S. Section 4-498, in that on October 26, 1989, "Hospitality Investments," by its servants, agents or employes, advertised or permitted the advertising in any manner whatsoever the price at which alcoholic beverages would be sold.

FINDINGS OF FACT:

1. Officer Casiano noted that on October 26, 1989, an advertisement appeared in the "Daily Pennsylvania" for the licensed premises which read in part "$1.00 for regular drinks, 9:00 until midnight" (N.T. 4 and Exhibit B-3).

CONCLUSIONS OF LAW:

On October 26, 1989, "Hospitality Investments," by its servants, agents or employes, advertised or permitted the advertising of the price at which alcoholic beverages would be sold, in violation of Section 498 of the Liquor Code, 47 P.S. Section 4-498.

PRIOR RECORD:

According to information received from the PSP, Bureau of Liquor Control Enforcement, as provided by the PLCB, Bureau of Licensing, of which we hereby take administrative notice, "Hospitality Investments" was first licensed on March 15, 1988, and has had no record of prior offenses.

DISCUSSION:

Counsel for the licensee indicated that the licensee's free speech was abridged and that Section 498 of the Liquor Code is unconstitutional and should not be ap-

plied to the licensee. This Court does not have jurisdiction to find a statute unconstitutional; however, the words of the statute are clear and indisputable. No licensee shall cause or permit the advertisement in any manner whatsoever the price of any malt beverage, cordial wine or distilled liquor offer for sale in the Commonwealth. The sole exception is outlined in Section 4-498(c) wherein it provides that this Section shall not apply to any trade journal which is duly recognized and authorized to be exempt from the provision by the Board.

Under the circumstances of this case, there is a clear violation of the Code and a monetary penalty shall be imposed.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than $50.00 nor more than $1,000.00, or both, for violations of the type found in this case.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby ordered that Licensee, Hospitality Investments of Philadelphia, Inc., License Number R-6205, pay a fine of Two Hundred Fifty Dollars ($250.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, Licensee's license shall be suspended or revoked and the bond forfeited.

The fine must be paid by Treasurer's Check, Cashier's Check or Certified Check. Personal Checks are not acceptable. Make check payable to the Commonwealth of Pennsylvania and mail to:

PLCB—Office of Administrative Law Judge
2973 Jefferson Street, Suite A
Harrisburg, PA 17110-2119

Dated this 2nd day of January, 1991.

/s/ Tania E. Wright
TANIA E. WRIGHT, J.

PENNSYLVANIA STATUTE

Pennsylvania statutes annotated Title 47, § 4-498:

Unlawful advertising

(a) No manufacturer, wholesaler, retailer or shipper whether from outside or inside this Commonwealth and no licensee under this act shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordial, wine or distilled liquor offered for sale in this Commonwealth: Provided, however, That the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the board.

(b) Any person who violates any of the provisions of this section commits a misdemeanor and shall, upon conviction, be sentenced to pay a fine of fifty dollars ($50) for the first offense and for each additional offense thereafter shall be sentenced to pay a fine of one hundred dollars ($100). Publication or broadcast by any person in violation of the provisions of this section shall also be subject to injunctive proceedings in a court of competent jurisdiction on a complaint brought by a retail licensee or an association of retail licensees.

(c) The provisions of this section shall not apply to any trade journal which is duly recognized and authorized to be exempt from the provisions of this section by the board.

REPORT TO

THE

PENNSYLVANIA LIQUOR CONTROL BOARD

ON

BEER PRICE ADVERTISING

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
ANTITRUST SECTION

July 31, 1985

Introduction

The question before the Pennsylvania Liquor Control Board (LCB) is: Should Pennsylvania consumers have access to beer price information through advertising? In this Report, the term "advertising", unless the context indicates otherwise, refers to advertising presently banned by LCB regulations, such as media advertising.

The Office of Attorney General, Antitrust Section, supports the proposed amendment by the LCB of 40 Pa. Code § 13.41(a) because price advertising generates greater competition and benefits consumers. More particularly, beer price advertising should be allowed because:

I. Beer Price Advertising Has Substantial Economic Advantages.

II. Disadvantages, If Any, Of Beer Price Advertising Are Minimal.

   A. Excessive Consumption Of Beer Will Not Result.

   B. Beer Industry Participants Are Not Harmed By Beer Price Advertising. (Expressions of concern that beer price advertising will adversely affect beer distributors or other beer industry participants assumes that the business survival of industry participants is a relevant LCB issue, which it appears not to be.)

III. Concerns Expressed About The Effects Of Beer Price Advertising Can Be Addressed By Alternatives Which Are Less Restrictive Than Banning Beer Price Advertising Altogether.

Each of these is separately discussed following this introductory section.

In order to present reliable economic analysis to the LCB, the Office of Attorney General, Antitrust Section,

retained Dr. Jon Nelson of the Economics Department of Pennsylvania State University, to search for economic studies and literature relevant to the question before the LCB, to locate relevant data, and to organize and make, if possible, economic and statistical analyses of that data. Dr. Nelson's qualifications are set forth in Exhibit "A." Dr. Nelson was requested to examine three particular relationships:

1. The relationship between price advertising and beer consumption.
2. The relationship between price advertising and price itself.
3. The effect of beer price advertising on the business survival of industry participants.

Dr. Nelson's analysis was in part subject to the availability of data with which to make statistical studies. Accordingly, Dr. Nelson's conclusions varied in the extent to which he could definitively come to conclusions on these questions. Dr. Nelson's study results are incorporated in this Report.

I. Beer Price Advertising Has Substantial Economic Advantages

Advertising, including price advertising, provides consumers with the information necessary to make informed purchasing decisions. The United States Supreme Court recognizes this when addressing the significance of commercial speech (advertising):

> Even though the [advertiser's] interest is largely economic, the Court has protected [commercial] speech in certain contexts. The [consumer's] interest is substantial . . . . [C]ommercial speech serves to inform the public of the availability, nature, and *prices of products* and services, and thus performs an *indispensable* role in the allocation of resources in a free enterprise system. In short, such speech serves in-

> dividual and societal interests in assuring informed and reliable decisionmaking.

Bates the State Bar of Arizona, 433 U.S. 350, 364 (1977) (citations omitted) (emphasis added).

The fact that advertising is important to competition is evident in federal and state court decisions. For example, self-imposed restrictions among competitors not to advertise prices violates the antitrust laws. *See United States v. Gasoline Retailers Association, Inc.*, 285 F.2d 688 (7th Cir. 1961). This illustration is applicable, because the law of Pennsylavnia is that basic federal antitrust law principles reflect the law which governs trade practices in Pennsylvania. *Collins v. Main Line Board of Realtors*, 452 Pa. 342, 304 A.2d 493 (1973).

Actions of the LCB itself show that there is nothing inherently wrong with price advertising of alcoholic beverages. For example, taverns may advertise six pack prices. Beer distributors are permitted to post prices in their stores. The Commonwealth itself advertises liquor prices. *See* Exhibit "B" (copy of ad appearing in *Pittsburgh Post Gazette*, May 16, 1985, p. 28). Further, beer prices are conveyed by word of mouth, another method of distributing information.

Past economic studies for products and services ranging from eye care to gasoline support the proposition that price advertising will result in lower prices to consumers. *See*, Bond, Kwoka, Phelan and Whitten, *Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry*, Federal Trade Commission, 1980, Washington, D.C.; Cady, *Advertising Restrictions and Retail Prices*, 16 J. OF ADVERTISING 27 (1976); Steiner, *Does Advertising Lower Consumer Prices*, 37 J. OF MARKETING 19 (1976); Benham, *The Effect of Advertising on the Price of Eyeglass*, 15 J. OF LAW & ECON. 337 (1972); and Maurizi, *The Effect of Laws Against Price Advertising: The Case of Retail Gasoline*, WESTERN ECON. J. 321

(September 1972). While Dr. Nelson's own preliminary economic analysis found no direct relationship between advertising and beer prices, his analysis could only be based on the limited data available, which were the prices of six packs. *See* Exhibit "C" (table listing average six pack beer prices on state-by-state basis). The limited preliminary analysis results were unexpected by Dr. Nelson, because of the substantial amount of evidence (see above) showing that, as to other products, price advertising reduces prices. (Dr. Nelson's computer-assisted economic studies on all questions he investigated are available to the LCB for its examination).

There are other economic costs to the public which come into play if there is no price advertising. For example, without price advertising, comparison shopping costs will be substantially increased for consumers interested in price information. If consumers want to know current prices, they must shop the stores in their neighborhood. Further, because prices are constantly changing, consumers must revisit stores on a regular basis if they want current price information. The advantage to consumers of "specials" is lost unless the consumer happens to visit a store featuring a "special" at that time. These comparison shopping costs could be substantially reduced if price advertising is allowed. Price advertising will provide consumers who are interested in the price of beer with a readily accessible source of that information. *See* R. Boynton, B. Blake, and J. Uhl, *Retail Price Reporting Effects in Local Fruit Markets*, 65 AM. J. OF AGRICULTURE ECON. 20 (1983). Dr. Nelson concludes that, considering all factors, consumers clearly gain when price information is readily available.

II. Disadvantages, If Any, Of Beer Price Advertising Are Minimal.

A. *Excessive Consumption Of Beer Will Not Result.*

Price advertising does not increase beer consumption, according to Dr. Nelson's statistical analysis. Dr. Nelson was able to arrive at a firm conclusion on this point because of the availability of data. States allowing price advertising had no higher rates of consumption than states prohibiting it. New Hampshire, which prohibits price advertising of beer, had the highest per capita consumption of beer in the nation. *See* Exhibits "D" and "E" (tables listing state per capita consumption by rank and adult per capita consumption provided by *1984 Brewer Almanac*, United States Brewers Association, Washington, D.C., p. 72). Demand for beer is influenced by several factors: price, income, tourism, legal drinking age and the price of soft drinks. The demand for beer is inelastic meaning a decrease in price will not bring about a corresponding increase in consumption. This is a result of Dr. Nelson's study. The price inelasticity for beer has been proven by other studies. *See* Hogarty, Elzinga, *The Demand For Beer*, 54 REV. OF ECON. & STATISTICS 195 (May 1972); and Ornstein, *Control of Alcohol Consumption Through Price Increases*, 41 J. OF STUDIES OF ALCOHOL 807 (Sept. 1980).

B. *Beer Industry Participants Are Not Harmed By Beer Price Advertising.*

Price advertising increases competition which has the effect of constantly redistributing market shares among competitors. This economic process represents a healthy marketplace. *See* Y. Brozen, *Concentration, Mergers & Public Policy* (1st Ed. 1982); and M. Abion, *Advertising's Hidden Effects: Manufacturers Advertising and Retail Pricing* (1st Ed. 1983). In many other retail markets —drug stores, shoes, clothing, photography—retailers have faced increased competition from chain or discount

stores entering their markets. The evidence is that the markets have not been monopolized by the new entrants. Stores which do not discount have remained successful in all those markets.

Some distributors assert that price advertising will cause business failures. It is not at all clear that the LCB has any responsibility to assure the profitability of beer distributorships. It may not have any such responsibility and the business survival of industry participants may not be an appropriate LCB issue.

Be that as it may, as an economic matter, distributors cannot be ensured a prosperous future. Some distributors should probably not be in business. There are many factors which may separately or in combination cause business failure, none of which have to do with price advertising. Some distributors may be economically inefficient; location may be important; the nature of local markets may change so that local demand drops; the rate of beer consumption, on a nationwide basis, is decreasing. Price advertising is only one competitive factor which alone may not be significant.

Distributors are already facing increased competition from discounters. Word of mouth advertising and comparison shopping presently disseminate price information. Since there appears to be nothing inherently wrong with beer price advertising and there are means by which consumers can obtain price information, consumers should not be blocked from securing the same information by a more efficient means, price advertising. Price advertising efficiencies substantially benefit consumers by reducing shopping costs—such as gasoline, time, higher prices paid because of consumer decisions not to travel or spend time —associated with purchasing a product. Since the beer distribution market is generally price competitive, price advertising may not result in a substantial increase in competition from the distributors' point of view, but at

the same time it may be a substantial benefit to consumers by giving them the opportunity to reduce shopping costs.

In some cases, price advertising may be a business tool which distributors can use to correct misconceptions about their pricing structure. The widespread belief that there is a significant difference between prices charged by discount distributors and other distributors is not necessarily accurate. *See* Exhibit "F" (chart comparisons of price of several distributors). (Information believed available to the LCB will show that the distributors in this Exhibit who are "discount" distributors do not necessarily have significantly lower prices.)

As competition develops, if some beer distributors do fail as the result of price advertising, the market will not become less competitive and prices to the public will not increase. Entry into the beer distribution market as a competitor is easy in economic terms. A warehouse, unskilled labor and, perhaps, trucks, are necessary to enter the market. No specialized resources are required. While licensing is a barrier to entry, if distributors fail, their licenses are then available on the market. Dr. Nelson's opinion is that even if some distributors fail, the market will thus not become less competitive and prices will not increase.

III. Concerns Expressed About The Effects Of Beer Price Advertising Can Be Addressed By Alternatives Which Are Less Restrictive Than Banning Beer Price Advertising Altogether.

The main concerns about the adverse effects of beer price advertising seem to be alcohol abuse, resulting from increased consumption, and distributor failures. Portions of the preceding discussion respond to these concerns and were intended to provide information showing that these concerns are either not well founded or are minimal. However, assuming these concerns have merit, there are less restrictive alternatives to respond to these concerns than the total prohibition of price advertising.

As to alcohol abuse, tighter enforcement of existing safeguards, such as under age drinking laws and regulations and increasing the awareness of the consequences of alcohol abuse, should be considered. It is widely believed that a factor contributing to the decrease in alcohol consumption has been the impact of new drunk driving laws and the heightened public reaction to drunk driving.

As to distributor failures, there are well known legal tools available both to private parties and public agencies to deal with predatory pricing practices. Reductions in price which substantially lessen competition, that is, predatory pricing, are unlawful. *See Anheuser Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961). There is a *difference* between *low prices*, which reflect competition and benefit consumers, and *predatory prices*, that is, selling below cost, which eventually destroys competition. It is important to understand this difference because predatory pricing, feared by some distributors, is unlawful under section 2 of the federal Sherman Act, 15 U.S.C. § 2. If predatory pricing is present, direct action can be taken against it under the Sherman Act. This is a less restrictive and more direct means of dealing with predatory pricing—which can occur with or without price advertising—than by banning price advertising altogether.

Conclusion

Since beer price advertising has substantial economic advantages and benefits consumers, since the disadvantages, if any, of beer price advertising are minimal, and since concerns about the effects of beer price advertising can be dealt with by alternatives which are less restrictive than banning beer price advertising altogether, the LCB's proposal to amend 40 Pa. Code § 13.41(a) should be adopted.

EXHIBIT A

VITAE May 1985

NAME: Jon P. Nelson

BIRTH DATE: August 9, 1941

SOCIAL SECURITY NUMBER: 388-40-7663

MARITAL STATUS: Married (Naomi), Two children

OFFICE ADDRESS:

Department of Economics
The Pennsylvania State Univ.
University Park, PA 16802
(814) 865-8871

HOME ADDRESS:

708 W. Foster Avenue
State College, PA 16801
(814) 237-0157

ACADEMIC DEGREES:

B.S.—Economics—University of Wisconsin—1964
Ph.D.—Economics—University of Wisconsin—1970

DISSERTATION:

"An Interregional Recursive Programming Model of the U.S. Iron and Steel Industry, 1947-1967."

HONORS:

Senior graduation honors, 1964
Ford Foundation Fellowship, 1967-68
American Iron and Steel Institute Fellowship, 1968-69
National Academy of Sciences Committees, 1976-77, 1979-80
National Science Foundation Panel, 1978
Liberal Arts Research Recognition Award, 1980

EMPLOYMENT:

Professor, The Pennsylvania State University, 1978-
Graduate Officer, Pennsylvania State Univ., 1985-
Associate Professor, Pennsylvania State Univ., 1973-78
Assistant Professor, Pennsylvania State Univ., 1969-73
Research Fellow, University of Wisconsin, 1967-69

OTHER EXPERIENCE:

Consultant, Pennsylvania Department of Justice (1980-85); U.S. Department of Labor (1974-76); Department of Transportation (1973-74); National Science Foundation (1972-83); various private organizations. Research Assistant, State of Wisconsin (1964-67).

COURSES TAUGHT:

Industrial organization, antitrust and regulation, microeconomics, environmental economics.

RESEARCH AREAS:

Market structure and performance, technological change, regulation, environmental economics, investment demand, pricing behavior, cost-benefit analysis.

RESEARCH GRANTS:

NSF and Pennsylvania Science and Engineering Foundation (1970-72); U.S. Department of Labor (1974-75); U.S. Department of Transportation (1973, 1974-75, 1977-78); U.S. Bureau of Mines (1975-77). Author or co-author of ten final research reports.

SELECTED PUBLICATIONS:

"An Interregional Recursive Programs Model of Production, Investment, and Technological Change," *Journal of Regional Science,* April 1971, pp. 33-47.

"Regional Concentration in the Steel Industry," *Northeast Regional Science Review*, Spring 1972, pp. 218-225.

"An Interregional Recursive Programming Model of the Iron and Steel Industry," in G. Judge and T. Takayama (eds.), *Studies in Economic Planning Over Space and Time* (North-Holland, 1973), chapter 20 (pp. 368-393).

"A Class of Dynamic Models for Describing and Projecting Industrial Development" (with R. Day), *Journal of Econometrics*, June 1973, pp. 155-190.

"Forecasting Aggregate Supply of Coal Miners" (with E. Cohn and G. Neumann), *Socio-Economic Planning Sciences*, October 1974, pp. 293-299.

"Energy Conservation Policies of the Federal Energy Office" (with T. Ferrar), *Science*, February 1975, pp. 644-646.

"Forecasting Aggregate Demand for Coal Miners" (with E. Cohn and G. Neumann), *Applied Economics*, June 1975, pp. 81-92.

"The Demand for Space Heating Energy," *Review of Economics and Statistics*, November 1975, pp. 508-512.

"Climate and Energy Demand: Fossil Fuels," in T. A. Ferrar (ed.), *The Urban Costs of Climate Modification* (Wiley Inter-Science, 1976), Chapter 5 (pp. 123-137).

"Accessibility and the Value of Time in Commuting," *Southern Economic Journal*, January, 1977, pp. 1321-1329. Summarized in W. Nicholson, *Intermediate Microeconomics and Its Applications*, 3rd edn. (1983), p. 450.

"Cost-Benefit Analysis: Some Illustrations," in National Academy of Sciences, *Noise Abatement: Pol-*

icy Alternatives for Transportation (1977), Chapter 9 (pp. 183-206).

Economic Analysis of Transportation Noise Abatement (Ballinger Publishing Company, 1978), 265 pp.

"Residential Choice, Hedonic Prices, and the Demand for Urban Air Quality," *Journal of Urban Economics*, July 1978, pp. 357-369.

"Behavioral, Suboptimizing Models of Industrial Production, Investment and Technological Change" (with R. Day, et al.), in R. H. Day and A. Cigno (eds.), *Modelling Economic Change: The Recursive Programming Approach* (North-Holland, 1978), Chapter 4 (pp. 55-118).

"Airport Noise, Location Rent, and the Market for Residential Amenities," *Journal of Environmental Economics and Management*, December 1979, pp. 320-331.

"Airports and Property Values: A Survey of Recent Evidence," *Journal of Transport Economics and Policy*, January 1980, pp. 37-52.

"A Comparison of Alternative Econometric Models of Iron and Steel Investment Behavior" (with G. Neumann and R. Crandall), *Review of Economics and Statistics*, February 1980, pp. 122-127.

"Tax Policy and Steel Industry Investment Behavior: An Econometric Analysis" (with G. Neumann), *Quarterly Review of Economics and Business*, Autumn 1980, pp. 19-34.

"Measuring Benefits of Environmental Improvements: Aircraft Noise and Hedonic Prices," in V. K. Smith (ed.), *Advances in Applied Microeconomics* (JAI Press, 1981), Chapter 4 (pp. 51-75).

"Three Mile Island and Residential Property Values: Empirical Analysis and Policy Implications," *Land*

Economics, August 1981, pp. 363-372. Summarized in W. Nicholson, *Intermediate Microeconomics and Its Applications*, 3rd edn. (1983), p. 451.

"Highway Noise and Property Values: A Survey of Recent Evidence," *Journal of Transport Economics and Policy*, May 1982, pp. 117-138.

"Safety Regulation and Firm Size: Effects of the Coal Mine Health and Safety Act of 1969" (with G. Neumann), *Journal of Law and Economics*, October 1982, pp. 183-199. Summarized in American Enterprise Institute, *Regulation* (Jan. 1983), pp. 46-48.

"Real Income, Grade Inflation, Simultaneity, and Teaching Evalutions" (with K. Lynch), *Journal of Economic Education*, Winter 1984, pp. 21-37.

"Housing Values, Census Estimates, Disequilibrium and the Environmental Cost of Airport Noise: A Case Study of Atlanta" (with P. O'Byrne and J. Seneca), *Journal of Environmental Economics and Management*, forthcoming.

WORK IN PROGRESS:

"Multiplant Operation and Unionization."
"Entry, Exit and Sunk Costs."

RECENT PROGRAM APPEARANCES:

Appeared on the program of the AISI Steel Economics Seminar (1973, 1979) Eastern Economics Association (1974, 1977, 1982), Econometric Society (1970, 1975, 1984), Southern Economic Association (1978, 1980, 1985), Western Economic Association (1974, 1979), and at various other professional conferences and meetings.

REFEREE:

Regular basis for *Journal of Environmental Economics and Management, Land Economics,* and *Review of Economics and Statistics.*

Occasional referee for *American Economic Review, American Real Estate and Urban Economics Association Journal, Business Economics, Cato Review, Eastern Economic Journal, Economic Inquiry, Engineering Economist, Journal of the Air Pollution Control Association, Journal of Economic Behavior and Organization, Policy Analysis,* and *Southern Economic Journal.*

Manuscript reviewer for American Enterprise Institute, Harvard University Press, JAI Press, Penn State University Press, Resources for the Future, Transportation Research Board, and various commercial book publishers. Proposal and report reviewer for the National Science Foundation.

GRADUATE STUDENT RESEARCH DIRECTED:

Ph.D. dissertations (6); M.A. essays (13).

PROFESSIONAL AFFILIATIONS:

American Economic Association, Association of Environmental and Resource Economists, Industrial Organization Society.

ADDITIONAL PUBLICATIONS:

"A Note on the Economics of Metallurgical Coke Production," *Management Science,* December 1971, pp. 237-239.

"The Economic Costs of Airport Noise: Theory and Measurement" (with I. Feller), in *Interagency Symposium on University Research in Transportation Noise Proceedings,* Stanford University, March 1973, pp. 727-743.

"Residential and Commercial Demand for Space Heating Energy," in *Proceedings of the Pennsylvania Conference of Economists,* Bloomsburg State College, April 1975, pp. 1-20.

"Energy Conservation Policies of the Federal Energy Office: Reply" (with T. Ferrar), *Science*, 19 September 1975, p. 1015.

"Econometric Analysis of the Effects of Climate on Energy Demand," in *Economic and Social Measures of Biologic and Climate Change*, Institute for Defense Analyses, September 1975, Ch. 3 (65 pp.).

Review of *The Economics of Professional Team Sports* (by H. G. Demmert), *Antitrust Bulletin*, Winter 1975, pp. 939-942.

"Economic Considerations of Highway Noise Impact on Land," in *Final Report of the Highway Noise Research Workshop*, Florida Atlantic University, August 1977, pp. 60-63.

"Accessibility and the Value of Time in Commuting: Reply," *Southern Economic Journal*, July 1978, pp. 298-300.

Review of *Steel Production: Processes, Products, and Residuals* (by C. S. Russell and W. J. Vaughan), *The Engineering Economist*, Spring 1979, pp. 191-192.

"Tax Policy, Capital 'Shortages,' and Iron and Steel Investment Behavior" (with G. Neumann), in *Steel Industry Economics Seminar Proceedings*, University of Washington, June 1979, pp. 43-63.

"Estimating Demand Functions for Product Characteristics: Comment," *Journal of Consumer Research*, September 1982, pp. 219-20.

Review of *Clean Coal/Dirty Air* (by B. A. Ackerman and W. T. Hassle), *Southern Economic Journal*, October 1982, pp. 587-89.

Review of *Energy, Economics and the Environment* (by H. E. Daly and A. F. Umana), *Natural Resources Journal*, October 1982, pp. 1186-88.

"Comment on 'Can Government Regulate Safety? The Coal Mine Example'" (with G. Neumann), *American Political Science Review*, December 1982, pp. 876-78.

"The Monetary Evaluation of Noise Nuisance: Comment," in T. O'Riordan and R. K. Turner (eds.), *Progress in Resource Management and Environmental Planning* (John Wiley, 1983), pp. 201-09.

Pennsylvania Liquor Board lowers prices
SALE
The price on Black Velvet Canadian has been lowered 10%. Now you can get the same smooth taste. And you can get it for less. Sale lasts 3 days only. May 16, 17, 18.
1.75 LITER WAS $14.61
NOW $13.15
750 ML WAS $7.20
NOW $6.48
CANADIAN
BLACK VELVET
Smooth Blended Canadian
Black Velvet. Premium. Canadian.
PRICES SHOWN EFFECTIVE ONLY AT PENNSYLVANIA STATE LIQUOR STORES.
BLACK VELVET · BLENDED CANADIAN WHISKY 80 PROOF IMPORTED BY © 1963 HEUBLEIN, INC., HARTFORD, CONN.

EXHIBIT B

EXHIBIT C

AVERAGE PRICE ON STATE BY STATE BASIS

State	(1) (a) ACCRA Price	(2) (b) BLS Cost of Living	(3) (c) Real Price (1/2)
1. Alabama	2.9500	.90000	3.2778
2. Alaska	.0	1.2600	.0
3. Arizona	2.5000	.98000	2.5510
4. Arkansas	2.8300	.89000	3.1798
5. California	2.4700	.98000	2.5204
6. Colorado	2.5900	.98000	2.6429
7. Connecticut	3.0500	1.1100	2.7477
8. Delaware	2.5700	1.0400	2.4712
9. Dist. of Columbia	2.8400	1.0800	2.6296
10. Florida	2.4900	.91000	2.7363
11. Georgia*	3.3100	.90000	3.6778
12. Hawaii	.0	1.2600	.0
13. Idaho	2.7900	.96000	2.9063
14. Illinois	2.4900	.98000	2.5408
15. Indiana	2.2100	.97000	2.2783
16. Iowa	2.4600	.93000	2.6452
17. Kansas	2.6600	.94000	2.8298
18. Kentucky	2.6900	.92000	2.9239
19. Louisiana	2.6000	.90000	2.8889
20. Maine	3.0400	1.0200	2.9804
21. Maryland	2.7800	.98000	2.8367
22. Massachusetts	2.7600	1.1300	2.4425
23. Michigan	2.8000	.98000	2.8571
24. Minnesota*	2.5200	.98000	2.5714
25. Mississippi*	2.7900	.86000	3.2442
26. Missouri	2.5700	.94000	2.7340
27. Montana	2.7000	.96000	2.8125
28. Nebraska	2.6100	.91000	2.8681
29. Nevada	2.6000	1.0500	2.4762
30. New Hampshire*	2.5000	1.0200	2.4510
31. New Jersey	2.6100	1.1500	2.2696
32. New Mexico	2.4700	.97000	2.5464
33. New York	3.0400	1.1500	2.6435
34. North Carolina	2.5300	.89000	2.8427
35. North Dakota	2.5400	.91000	2.7912
36. Ohio*	2.6000	.99000	2.6263
37. Oklahoma*	2.5600	.90000	2.8444
38. Oregon	2.9900	1.0000	2.9900

State	(1) (a) ACCRA Price	(2) (b) BLS Cost of Living	(3) (c) Real Price (1/2)
39. Pennsylvania (d)*	2.3300	1.0400	2.2404
40. Rhode Island*	2.9000	1.1500	2.5217
41. South Carolina	2.8700	.86000	3.3372
42. South Dakota	2.7400	.91000	3.0110
43. Tennessee	2.9900	.86000	3.4767
44. Texas	2.6200	.88000	2.9773
45. Utah	2.2400	.96000	2.4375
46. Vermont	3.0500	1.0200	2.9902
47. Virginia*	2.7500	1.0000	2.7500
48. Washington	2.7800	1.0000	2.7800
49. West Virginia	2.9300	.90000	3.2556
50. Wisconsin	2.3300	1.0100	2.3069
51. Wyoming	3.4400	.96000	3.5833

* States which prohibit price advertising.

(a) Prices are from the American Chamber of Commerce Research Association (ACCRA) price lists for the second and third quarters of 1982. Average prices for each state were calculated by weighing prices recorded in cities in each state. ACCRA collects prices for six packs of Budweiser and Schlitz 12 oz. cans less any container deposits.

(b) Cost of living index derived from Bureau of Labor Statistics indexes for cities and rural areas within each state.

(c) The ACCRA price as modified by the cost of living index for that state.

(d) Pennsylvania's six pack market is sale from taverns and other eating places, different from most other states. Pennsylvania's ACCRA prices were accordingly adjusted by Dr. Nelson to permit a comparison.

EXHIBIT D

STATE PER CAPITA CONSUMPTION BY RANK
1982-1983 (in gallons)

State	1983 Rank	Per Capita Consumption	1982 Rank	Per Capita Consumption
New Hampshire	1 P	38.7	3	33.8
Nevada	2	36.0	1	35.5
Wisconsin	3	34.0	2	34.1
Hawaii	4	32.6	5	31.2
Montana	5	30.9	4	31.3
Texas	6	29.7	6	31.0
Arizona	7	29.3	8	29.2
New Mexico	8	29.1	11	28.0
Alaska	9	29.0	9	28.6
District of Columbia	10 *	28.7	12	27.7
Florida	10 *	28.7	10	28.4
Wyoming	12 *	27.6	7	29.6
Delaware	12 *	27.6	13	27.4
Vermont	14 *	27.0	17	26.1
Rhode Island	14 *P	27.0	25	24.5
Colorado	16	26.5	14	27.3
Nebraska	17	26.1	16	26.2
North Dakota	18	25.8	15	26.5
Pennsylvania	19 P	25.5	19	25.9
Illinois	20 *	25.0	21 *	24.8
Massachusetts	20 *	25.0	18	26.0
Maryland	22	24.9	21 *	24.8
California	23	24.7	23	24.7
Iowa	24	24.6	26 *	24.4
Missouri	25 *	24.2	26 *	24.4
Louisiana	25 *	24.2	20	25.1
Minnesota	27 *	24.1	28 *	23.9
Ohio	28 P	23.9	24	24.6
Idaho	29	23.8	28 *	23.9
Michigan	30	23.6	30	23.6
Maine	31	23.4	33	23.2
Oregon	32	23.1	31 *	23.3
Washington	33	22.7	31 *	23.3
Virginia	34 P	22.5	36	22.2
South Dakota	35 *	22.3	37	22.1
New York	35 *	22.3	34	22.6
Indiana	35 *	22.3	35	22.5

State	1983 Rank	Per Capita Consumption	1982 Rank	Per Capita Consumption
New Jersey	38	21.9	38	22.0
South Carolina	39	21.8	40	21.3
Kansas	40	21.0	39	21.4
Georgia	41 P	20.8	42	20.2
Connecticut	42	20.2	46 *	19.3
West Virginia	43 *	20.1	46 *	19.3
Mississippi	43 *P	20.1	43 *	19.8
North Carolina	45	19.6	48	19.0
Kentucky	46 *	19.5	45	19.7
Tennessee	46 *	19.5	43 *	19.8
Oklahoma	48 P	18.5	41	20.4
Arkansas	49	17.9	49	17.8
Alabama	50	17.7	50	17.3
Utah	51	13.5	51	15.4

* Tied.

P = States which prohibit beer price advertising.

EXHIBIT E

ADULT PER CAPITA CONSUMPTION 1982-83

State	1983	1982
1. Alabama	24.6	24.2
2. Alaska	40.3	42.8
3. Arizona	40.8	42.2
4. Arkansas	24.9	25.0
5. California	33.4	33.5
6. Colorado	36.2	37.8
7. Connecticut	26.6	25.5
8. Delaware	37.1	37.0
9. Dist. of Columbia	36.7	35.0
10. Florida	37.2	37.2
11. Georgia*	29.0	28.5
12. Hawaii	45.0	43.4
13. Idaho	35.1	35.7
14. Illinois	34.3	34.2
15. Indiana	30.8	31.4
16. Iowa	33.8	33.6
17. Kansas	28.7	29.2
18. Kentucky	27.1	27.8
19. Louisiana	34.9	36.4
20. Maine	32.0	31.9
21. Maryland	33.4	33.5
22. Massachusetts	32.9	34.2
23. Michigan	32.6	32.9
24. Minnesota*	33.2	33.0
25. Mississippi*	29.0	29.1
26. Missouri	32.9	33.3
27. Montana	43.3	44.2
28. Nebraska	36.0	36.4
29. Nevada	48.5	47.8
30. New Hampshire*	52.4	45.9
31. New Jersey	29.2	29.5
32. New Mexico	42.0	40.9
33. New York	29.8	30.2
34. North Carolina	26.7	25.9
35. North Dakota	36.2	37.3
36. Ohio*	32.8	33.9

State	1983	1982
37. Oklahoma*	25.6	28.6
38. Oregon	31.5	32.0
39. Pennsylvania (d)*	33.9	34.7
40. Rhode Island*	35.4	32.3
41. South Carolina	30.5	30.2
42. South Dakota	31.5	31.2
43. Tennessee	26.6	27.3
44. Texas	42.2	44.2
45. Utah	21.6	24.8
46. Vermont	36.9	36.2
47. Virginia*	30.3	30.0
48. Washington	30.9	32.0
49. West Virginia	27.7	26.9
50. Wisconsin	46.7	46.9
51. Wyoming	40.0	43.5

EXHIBIT F

PRICE COMPARISON

Lower Bucks County
Comparisons made July 23, 1985
All Prices Include 6% Sales Tax

Store:	Ruger's Levittown	Penn-Thrift Levittown	Deon's Fairless Hills	Brewer's Outlet Fairless Hills	Newtown Beverage Newtown
Prices:					
Budweiser 12 oz. cans	$10.65	$10.55	$10.65	$10.19	$10.07
Rolling Rock 12 oz. cans	9.40	8.45	9.39	9.34	9.54
Schmidt 12 oz. cans	9.40	8.89	7.99	8.35	8.60
Miller Lite 12 oz. cans	10.95	10.55	10.99	10.94	11.18
Moosehead 12 oz. bottles	15.30	14.30	15.25	15.09	15.75
Meisterbrau 12 oz. cans	7.55	7.20	7.39	7.25	7.85

PRICE COMPARISON

Harrisburg—Scranton—Williamsport—Pittsburgh
Comparisons made July 25 and 26, 1985
All Prices Include 6% Sales Tax

Store	Beverage Barn Williamsport	George's Beer Distributors Pittsburgh	Craig's Distributors Pittsburgh
Prices:			
Budweiser (12 oz. cans)	$ 9.79	$10.50	$ 9.75
Rolling Rock (12 oz. cans)	$ 9.29	$ 9.25	$ 8.75
Schmidts (12 oz. cans)	$ 7.69	$ 8.35	$ 8.75
Miller Lite (12 oz. cans)	$ 9.99	$10.25	$ 9.75
Moosehead (12 oz. bottles)	$15.19	N/A	$15.95
Meisterbrau (12 oz. cans)	$ 7.59	$ 7.90	$ 7.50

PRICE COMPARISON

Harrisburg—Scranton—Williamsport—Pittsburgh

All Prices Include 6% Sales Tax

Store:	Case-O-Beer Harrisburg	State Street Discounters Harrisburg	Hollywood Beer Distributors Mechanicsburg	Harrington's Scranton	Williamsport Beverage Co. Williamsport
Prices:					
Budweiser (12 oz. cans)	$11.00	$ 9.53	$11.00	$ 9.85	N/A
Rolling Rock (12 oz. cans)	$10.25	$ 8.53	$10.23	$ 9.10	N/A
Schmidts (12 oz. cans)	$ 8.50	$ 7.33	$ 8.75	$ 8.85	N/A
Miller Lite (12 oz. cans)	$11.30	$ 9.53	$11.31	$ 9.95	$11.02
Moosehead (12 oz. cans)	$16.25	$13.77	$17.77	N/A	$17.00
Meisterbrau (12 oz. cans)	$ 7.25	$ 7.09	$ 7.98	N/A	$ 7.95

COMMONWEALTH OF PENNSYLVANIA

Order Adopting Regulations

Pennsylvania Liquor Control Board

(Name of subordinate unit, if any, adopting order)

Date of Order: September 4, 1985

Before (Members: Daniel W. Pennick, Chairman):

Ralph Barnett, Member—Mario Mele, Member

(Insert names of agency members participating in action or order.)

Caption of Agency Proceeding (if any): _____

Agency Docket No. or File No. (if any): _____

Brief Descriptive Title of Order: Beer Price Advertising

Insert here (and continue on additional sheets 1a, 1b, 1c, etc., as required) a brief narrative discussion of the background leading up to the agency decision to adopt the subject order: As the result of a court challenge to the regulation in question, the Liquor Control Board's Chief Counsel reviewed the regulation and determined that its constitutionality (both under Pennsylvania and United States constitutions) was questionable, and recommended rescission of the regulation. The Independent Regulatory Review Commission, as well as the Office of the Attorney General, concurred, and also found that it would be in the

best interest of the citizens of the Commonwealth to permit the advertising of malt and/or brewed beverage prices. It was noted by all of the foregoing that there are no similar prohibitions against the advertising of other alcoholic beverage prices.

The Board conducted a lengthy public hearing and after a review of all the relevant data and testimony, voted unanimously to rescind the regulation. It was further determined that it would be in the best interest of the citizens to make the rescission effective as of the date of the vote, and issued a press release announcing this decision. The release received wide general distribution.

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(2) Public comments were received by the Liquor Control Board and a public hearing was held by the Board on July 31, 1985. Thirteen letters were received by the Executive Director and/or Members of the Liquor Control Board relative to beer price advertising during the 30-day comment period. Ten expressed opposition to the proposal to rescind the regulations and three expressed support of the Board's proposal. In addition, an extensive report written by a Pennsylvania State University Economist was received. This report supported the proposed regulatory amendment.

Ten persons appeared and testified at the public hearing. Arguments presented on both sides of the issue can be broadly categorized as follows: 1) Economic considerations, 3) legal considerations, and 3) social considerations. Related to economic considerations, an economist retained by the Office of the Attorney General, Anti-Trust Division, examined the effect of price advertising on beer prices, the effect of price advertising on consumption, and the effect of beer price advertising on business survival of industry participants. Based on the available data, the econ-

omist concluded that price advertising does not increase beer consumption and beer industry participants are not harmed by beer price advertising. It was pointed out that beer price advertising offers substantial economic advantages.

Those opposed to the regulatory proposal raised the issue of the impact of increased competition from "discounters". The Board recognizes that some economic influence has been and probably will continue to be felt as some distributors are offering discount prices to consumers. Price advertising may cause additional consumers to become aware that lower prices are available, possibly creating more economic hardship for those distributors who do not participate in the discount pricing measures. While the Board is concerned for the economic survival of industry participants, it also recognizes that a license to sell malt or brewed beverages does not necessarily guarantee success in the industry. There are many factors which impact upon the success and/or competitiveness of business including location, demand, product lines carried and demographics of the market-place. The Board was not convinced that price advertising is the sole determinant of the business success rate. Testimony was offered to indicate that price advertising was responsible for the closings of several distributors over the past year. Since price advertising was permitted only for a short time, it must be assumed that the distributors that have closed, did so for reasons other than price advertising per se. Regardless of the reason for the success or failure of any business venture, the Liquor Control Board's statutory authority and regulatory responsibility does not encompass the guarantee of licensee profitability.

Regarding legal considerations, the Liquor Control Board felt that the testimony of the Chief of the Anti-Trust Section of the Attorney General's Office and the advice of it's own Chief Counsel was valid and outweighed the legal

objectives raised by those seeking to keep the regulation intact.

With regard to social/other considerations, the Board heard concern expressed over the possibility of additional consumption and abuse of alcoholic beverages should beer price advertising be permitted. In evaluating this issue, the Board recognized the types of advertisements currently permitted under the Liquor Code and its regulations. It is felt that since advertisements which glamorized the use of malt beverages are already permitted, the addition of price advertising would not itself stimulate additional consumption or abuse. If the purpose of price prohibition is to protect the consumer, no case was made to indicate that it does. On the contrary, it appears that the consumer would be best served by being permitted to be informed of the prices of the beverages.

Further, the Board notes that no other form of alcoholic beverage price advertising is prohibited in the Commonwealth. Thus, it appears to be inconsistent with governing law as well as PLCB policy to support a prohibition against beer price advertising by manufacturers and distributors.

Insert here (1) a brief narrative description of the notice of proposed rulemaking action taken by the agency, including a reference to the volume, page and date of publication of the issue or issues of the Pennsylvania Bulletin in which the proposed administrative regulation or change therein was noticed for public comment, (2) a brief discussion of the comments and suggestions, if any, received from the public in response thereto, and (3) a brief summary or any modifications in the originally proposed regulations embodied in the final text as adopted by the subject order:

(1) Pursuant to Section 5(a) of the Regulatory Review Act of 1982 (P.L. 633, No. 181), on June 17, 1985 and the regulation was submitted to the Independent Regulatory Review Commission and the standing House and Sen-

ate Committees for review and comment. The Notice of Proposed Rulemaking was published in 15 PA Bulletin, page 2397, on July 29, 1985. Within the review period, the regulation was disapproved by the House Liquor Control Committee and the Senate Law and Justice Committee. The Independent Regulatory Review Commission met on July 3, 1985 and approved the regulation. The various oversight requirements of the Regulatory Review Act have been fulfilled.

(2) Please see attached.

(3) The regulation is rescinded as indicated in Annex A. The (regulations) hereby (rescinded) are (adopted) pursuant to (Insert here a statement of the statutory or other authority for the adoption by the agency of the subject order, including a parallel citation to *Purdon's Statutes*): Liquor Code, Act 21, of April 12, 1951, P.L. 90, Section 207(t); 47 P.S. § 2-207(1). (The "authorizing statute(s)").

The Pennsylvania Liquor Control Board finds:

(1) That public notice of intention to (rescind) the administrative regulations (rescinded) by this order has been duly given pursuant to Sections 201 and 202 of the Commonwealth Documents Law (45 P.S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) That the (rescission) of the (regulations) of the Pennsylvania Liquor Control Board in the manner provided in this order is necessary and appropriate for the administration (and enforcement) of the authorizing statute (s).

The Pennsylvania Liquor Control Board acting pursuant to the authorizing statue (s), orders:

(A) The (regulations) of the Pennsylvania Liquor Control Board, 40 Pa. Code Chapter 13 are amended by (deleting) and [*sic*] Sections 13.41(a) and adopted to read as set forth in Annex A to this order.

(b) The Chairman of the Pennsylvania Liquor Control Board shall submit this order and Annex A hereto to the Department of Justice for approval as to legality as required by law.

(C) The Chairman of the Pennsylvania Liquor Control Board shall duly certify this order and Annex A hereto and deposit the same with the Legislative Reference Bureau as required by law.

(D) (If the order is to take effect at a time subsequent to publication in the Pennsylvania Bulletin.) This order shall take effect immediately.

By the Pennsylvania Liquor Control Board

/s/ [Illegible]
Signature of Certifying Officer

Daniel W. Pennick
Name of Certifying Officer

Chairman
Title of Certifying Officer

[Affix agency seal, if possible]

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

Copy below is hereby approved as to form and legality. Attorney General

By: _____
Deputy Attorney General

_____
Date of Approval

☐ Check if applicable
Copy not approved. Objections attached.

Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:

Pennsylvania Liquor Control Board

Document/Fiscal Note No. 54-16

Date of Adoption: _____

By: /s/ [Illegible]

Title: Chairman
(Executive Officer, Chairman or Secretary)

Copy below is hereby approved as to form and legality. Executive or Independent Agencies.

By: /s/ [Illegible]

10-24-85
Date of Approval
(Chief Counsel)
(Strike inapplicable title)

☐ Check if applicable. No Attorney General approval or objection within 30 days after submission.

ANNEX A

SECTION 13.41. MALT OR BREWED BEVERAGES.—

[(a) Manufacturers, importing distributors and distributors of malt or brewed beverages may advertise the brand names of such beverages in, on, or by billboards, newspapers, magazines, radio, and television, provided such advertisements make no direct or indirect reference to the price at which such manufacturer, importing distributor or distributor sells the beverages, or imply an inducement by the use of words or expressions, such as "special," "save," "big value," get acquainted offer," etc.]

[(b)] Manufacturers and importing distributors of malt or brewed beverages, may include the names and addresses of all distributors and importing distributors to whom they sell in the locality covered by such advertising. No discrimination may be shown to one distributor or importing distributor over another, and where more than one distributor or importing distributor purchases the products from the manufacturer or importing distributor in the area covered by such advertisement, the names and addresses of all who purchase the product directly from the advertiser shall be displayed or mentioned in equal prominence. Where this is not done, none may be displayed or mentioned.

Senator WILLIAMS. Mr. President, I made a mistake. I think I was heard in voting in the negative. That actually was the affirmative.

The PRESIDENT. The Clerk will report and record Senator Williams in the affirmative.

Senator JONES. Mr. President, I, too, would like my vote changed from "no" to "aye."

The PRESIDENT. The Clerk will record Senator Jones in the affirmative.

The yeas and nays were required by Senator RHOADES and were as follows, viz:

YEAS—21

Afflerbach
Armstrong
Bell
Bodack
Brightbill
Corman
Greenleaf
Greenwood
Hankins
Hess
Hopper
Jones
Madigan
Mellow
Pecora
Rhoades
Stewart
Stout
Tilghman
Wenger
Williams

NAYS—28

Andrezeski
Fisher
Fumo
Helfrick
Holl
Jubelirer
Kelley
Lemmond
Lewis
Lincoln
Loeper
Lynch
Moore
Musto
O'Pake
Peterson
Regoli
Reibman

Rocks	Shumaker
Romanelli	Stapleton
Ross	Stauffer
Salvatore	Wilt
Shaffer	Zemprelli

Less than a majority of the Senators having voted "aye," the question was determined in the negative.

And the question recurring,

Will the Senate agree to the bill on third consideration, as amended?

MADIGAN-WILT-ROMANELLI AMENDMENT

Senator MADIGAN, on behalf of himself and Senator WILT, by unanimous consent, offered the following amendment:

Amend Bill, page 198, by inserting between lines 27 and 28:

Section 86. The act is amended by adding a section to read:

Section 498. Unlawful Advertising.—(a) No manufacturer, wholesaler, retailer or shipper whether from outside or inside this Commonwealth and no licensee under this act shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordial, wine or distilled liquor offered for sale in this Commonwealth: Provided, however, That the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the board.

(b) Any person who violates any of the provisions of this section commits a misdemeanor and shall, upon conviction, be sentenced to pay a fine of fifty dollars ($50) for the first offense and for each additional offense thereafter shall be sentenced to pay a fine of one hundred dol-

lars ($100). Publication or broadcast by any person in violation of the provisions of this section shall also be subject to injunctive proceedings in a court of competent jurisdiction on a complaint brought by a retail licensee or an association of retail licensees.

(c) The provisions of this section shall not apply to any trade journal which is duly recognized and authorized to be exempt from the provisions of this section by the board.

On the question,

Will the Senate agree to the amendment?

Senator MADIGAN. Mr. President, on behalf of myself and the gentleman from Mercer, Senator Wilt, I am offering an amendment which would provide adding Section 498, which would prohibit the advertising of price. The amendment states, ". . . No manufacturer, wholesaler, retailer or shipper whether from outside or inside this Commonwealth and no licensee under this act shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordial, wine or distilled liquor offered for sale in this Commonwealth. . . ." I know the issue is debatable. Many people in the Bible Belt of this state who support liquor control feel that such advertising would have an impact on the consumption of alcohol and, therefore, I am pleased to urge support for this amendment.

LEGISLATIVE LEAVE CANCELLED

The PRESIDENT. Prior to the roll call, the Chair recognizes the presence on the floor of Senator Salvatore and his temporary Capitol leave will be cancelled.

And the question recurring,

Will the Senate agree to the amendment?

Senator ROMANELLI. Mr. President, I would ask the maker of the amendment to add my name to the amendment. I would also add support for it. I would ask my colleagues to support it. I have an identical amendment and, therefore, I will not have to offer it if this one passes.

The PRESIDENT. Would the gentleman from Bradford agree to list Senator Romanelli as a cosponsor of the amendment?

Senator MADIGAN. Mr. President, I am pleased to add the gentleman from Allegheny as a cosponsor to my amendment and sincerely appreciate his support.

The PRESIDENT. The Clerk will make notation of the sponsorship.

Senator ROMANELLI. Mr. President, I, too, feel that if we are ever going to put these Beer Worlds of Pennsylvania out of existence, the ones that are wrecking our small distributors, this is the way to do it; curb their advertising.

Senator MELLOW. Mr. President, I find myself in the very uncomfortable position of having to take a position against a Member of my own caucus, he being the gentleman from Allegheny, Senator Romanelli, who has just actively stated his support for the amendment. I think, Mr. President, this is probably one of the most important parts of House Bill No. 1000 that we can deal with today because it basically has a direct dealing with the people's right to know. It has basically little to do with putting anybody out of business or establishing business interest for any particular individual or corporation. What this amendment does, Mr. President, is it perpetuates the system as we have it today with regard to advertising. We add nothing new in the Liquor Code by continuation of advertising or by opposing the amendment that has been offered by the gentleman from Bradford, Senator Madigan.

Mr. President, basically, I do not think there is any reason why we should deny the consuming public—the consumer who is not sitting in this room today—the opportunity to be able to pick up a newspaper and be able to read what serves their best interest with regard to the purchasing of spirits, liquor or beer because of advertising. I think when you talk about consumer interest, when you talk about credit card purchasing and you talk about advertising, you basically hit the two strong points of this particular proposal. I would very strongly oppose the amendment that has been offered by the gentleman from Bradford, Senator Madigan, with support of the gentleman from Mercer, Senator Wilt, and the gentleman from Allegheny, Senator Romanelli, because by and large what this does is it returns us to the point we were at some twenty months ago before regulations were adopted that made advertising possible in the best interest of the consumer. I do not view this particular amendment, Mr. President, or the prohibition of advertising, as a way of putting any particular group out of business, because I would be totally opposed to putting anybody out of business who is runing a legitimate operation in Pennsylvania for a profit. I would want to keep them in business. I think, Mr. President, by us going ahead and accepting this particular amendment, we do go a long way in telling the consumers in Pennsylvania that we do not think it is important for them to know what the competitive price is in their purchases and we do not think it is important for them to know where, in fact, they might be able to purchase something at a lower price. In this day and age I see absolutely no useful purpose in accepting this amendment and I would request a negative vote on the amendment.

Senator BELL. Mr. President, I support this amendment very, very strongly because in my district out-of-state firms advertise "Come across the border and buy your booze. It is a lot cheaper." I know that does not happen

in the district of the gentleman from Philadelphia, Senator Fumo, which is right adjacent to mine, because his people do not go to New Jersey over those two bridges and buy their booze. But, down our way, I do not want any more of my people—and I think he called them smugglers, chiselers, criminals, and every other thing, and, in fact, he said one lady may have been a prostitute, I did not know how the hell that would come in, and I do not think we should encourage criminal activity. I want my people to be lily pure, just like Senator Fumo's people.

Senator ROMANELLI. Mr. President, it is a proven fact that every time one of the Beer Worlds of this Commonwealth opens up and starts their pattern of advertising, there are eight or ten small I.D.'s that go out of business. With every one of them we probably lose four or five more jobs. I know that is the case in western Pennsylvania. It may not be the case in the northeast tier, but it is the case in western Pennsylvania. I would urge an affirmative vote here.

Senator HESS. Mr. President, I think we all in this Body understand the controversy over this particular issue. As I understand the current federal requirements regarding the advertising of tobacco products, in particular cigarettes, whether it be the price or the name brand or any other type of advertising affecting cigarettes and —this is my understanding—any type of advertising that mentions the brand name. I have a pack of Winston 100 Lights here which says that smoking by pregnant women may result in fetal injury, premature birth and low birth weight. As I read the bill now before us, no warning is stipulated regarding the advertising of pricing of alcohol or spirits or malt beverages. Until I see that in the bill, I am going to support the amendment. I do not think we should have one rule for our tobacco farmers and another rule for our liquor producers.

LEGISLATIVE LEAVE

Senator MELLOW. Mr. President, I request a Capitol leave for Senator Williams who was just called from the floor.

The PRESIDENT. Senator Mellow requests a temporary Capitol leave for Senator Williams. Is there an objection? The Chair hears none. The leave will be granted.

And the question recurring,

Will the Senate agree to the amendment?

(During the calling of the roll, the following occurred:)

Senator MELLOW. Mr. President, I would like to change the vote of Senator Andrezeski from "aye" to "no."

The PRESIDENT. The gentleman will be so recorded.

POINT OF ORDER

Senator PECORA. Mr. President, I rise to a point of order.

The PRESIDENT. The gentleman from Allegheny, Senator Pecora, will state it.

Senator PECORA. Mr. President, has every absentee Senator from this floor given instructions on how to vote on each amendment?

The PRESIDENT. The Chair would presume so.

Senator PECORA. Mr. President, I am not asking for a presumption. I am asking a question, Mr. President. I would like verification of it.

The PRESIDENT. The Chair would suggest to the gentleman that he might direct that inquiry to the leaders on both sides.

Senator PECORA. Mr. President, under the point of order, do I have the authoirty to look at the instructions?

The PRESIDENT. The Chair would have no knowledge of that particular situation. The Chair would also remind the gentleman that with our system of temporary Capitol leaves, the instructions need not be in writing.

Senator LOEPER. May we be at ease, Mr. President?

The PRESIDENT. The Senate will be at ease.

(The Senate was at ease.)

Senator PECORA. Mr. President, referring to the point of order, it seems there have been some rules or some agreement on the procedure of voting. Even though I do not agree with it, it was accepted and we are following those rules. But, it gives me a bad impression when an absentee Senator votes "aye" or "nay" and then after the votes are counted it is changed.

The PRESIDENT. The Chair would remind the gentleman that his point of order has been stated and that we are in the middle of a roll call. Further remarks would be properly addressed under Petitions and Remonstrances.

PARLIAMENTARY INQUIRY

Senator MELLOW. Mr. President, I rise to a question of parliamentary inquiry.

The PRESIDENT. The gentleman from Lackawanna, Senator Mellow, will state it.

Senator MELLOW. Mr. President, when would it be appropriate for me to share with the Chair the orders that were given to me to vote on amendments? Is that an appropriate time, before the roll call is announced?

The PRESIDENT. No, that is not the appropriate time, Senator. The appropriate time would be after the announcement of the roll call.

The yeas and nays were required by Senator MADIGAN and were as follows, viz:

YEAS—24

Armstrong	Pecora
Bell	Peterson
Bodack	Romanelli
Brightbill	Ross
Hankins	Salvatore
Helfrick	Shaffer
Hess	Shumaker
Holl	Stewart
Hopper	Wenger
Jones	Williams
Lincoln	Wilt
Madigan	Zemprelli

NAYS—25

Afflerbach	Mellow
Andrezeski	Moore
Corman	Musto
Fisher	O'Pake
Fumo	Regoli
Greenleaf	Reibman
Greenwood	Rhodes
Jubelirer	Rocks
Kelley	Stapleton
Lemmond	Stauffer
Lewis	Stout
Loeper	Tilghman
Lynch	

Less than a majority of the Senators having voted "aye," the question was determined in the negative.

And the question recurring,

Will the Senate agree to the bill on third consideration, as amended?

Senator MELLOW. Mr. President, I guess you should never make assumptions, but I would assume that the

individual was directing the question as to why I changed the vote of the gentleman from Erie, Senator Andrezeski, on the amendment that was offered by the gentleman from Bradford, Senator Madigan. The instructions that were given to me by Senator Andrezeski in his writing is to be recorded as voting "no" on the amendment. A copy of the record is here at the desk if anyone would like to inspect it.

RECONSIDERATION OF MADIGAN AMENDMENT

Senator MADIGAN. Mr. President, I would like to move for a reconsideration of the amendment.

The PRESIDENT. Senator Madigan moves that the vote by which the previous amendment failed passage be reconsidered.

The motion was agreed to.

And the question recurring,

Will the Senate agree to the amendment?

(During the calling of the roll, the following occurred:)

Senator LOEPER. Mr. President, I would like to change my vote from "no" to "aye."

The PRESIDENT. The gentleman will be so recorded.

The yeas and nays were required by Senator MADIGAN and were as follows, viz:

YEAS—26

Armstrong	Moore
Bell	Pecora
Bodack	Peterson
Brightbill	Romanelli
Hankins	Ross
Hess	Salvatore
Holl	Shaffer

Hopper	Shumaker
Jones	Stewart
Lemmond	Wenger
Lincoln	Williams
Loeper	Wilt
Madigan	Zemprelli

NAYS—23

Afflerbach	Mellow
Andrezeski	Musto
Corman	O'Pake
Fisher	Regoli
Fumo	Reibman
Greenleaf	Rhoades
Greenwood	Rocks
Helfrick	Stapleton
Jubelirer	Stauffer
Kelley	Stout
Lewis	Tilghman
Lynch	

A majority of the Senators having voted "aye," the question was determined in the affirmative.

And the question recurring,

Will the Senate agree to the bill on third consideration, as amended?

ROMANELLI AMENDMENT

Senator ROMANELLI, by unanimous consent, offered the following amendment:

Amend Sec. 14 (Sec. 215), page 42, line 23, by inserting after "*ESTABLISHMENTS*": *: Provided, however, That in no instance shall such a wine specialty store be located in a retail establishment, whose principal business is the sale of food or food products.*

On the question,

Will the Senate agree to the amendment?

Senator ROMANELLI. Mr. President, this amendment simply states that no wine shall be sold in stores that are primarily food stores.

Senator LOEPER. Mr. President, it is my understanding that House Bill No. 1000 was amended in committee. That amendment included a provision which would allow the State Liquor Control Board to establish locations for the dispening of wine in speciality stores within any retail establishment. Therefore, I would oppose the amendment of the gentleman from Allegheny, Senator Romanelli.

LEGISLATIVE LEAVES CANCELLED

Senator MELLOW. Mr. President, first, I would like to have the record reflect the fact that Senator Ross is back on the floor and should be taken off Capitol leave.

The PRESIDENT. The Chair recognizes the presence on the floor of Senator Zemprelli, Senator Andrezeski and Senator Ross and their temporary Capitol leaves will be cancelled.

COURT OF APPEALS OF TENNESSEE

SHIRLEY A. WISE and
NEWSPAPER PRINTING CORPORATION,
Plaintiffs-Appellees

vs.

TENNESSEE ALCOHOLIC BEVERAGE COMMISSION and
WILLIAM M. LEECH, JR., Attorney General of Tennessee,
Defendants-Appellees

and

LICENSED BEVERAGE WHOLESALERS
OF TENNESSEE, INC.,
Intervening Defendant-Appellant

Appeal from Part I, Chancery Court,
Davidson County, Tennessee
Honorable Irvin H. Kilcrease, Chancellor

Filed: Apr. 13, 1982

DAVIDSON EQUITY

BEN H. CANTRELL, Judge

AFFIRMED AND REMANDED.

OPINION

This case involves the constitutionality of the rules of the Tennessee Alcoholic Beverage Commission which prohibit mass media advertising of beverage alcohol. The

Chancellor below declared the regulations unconstitutional.

The plaintiff Shirley A. Wise operates Hickory Liquors, a retail liquor store in Davidson County, Tennessee. She entered into an agreement with the plaintiff, Newspaper Printing Corporation, to place advertisements, including price information in *The Tennessean* and *Banner* newspapers, which circulate throughout middle Tennessee. The plaintiffs understood that the current rules of the Alcoholic Beverage Commission prohibited such advertising and agreed that the ads would not run unless permission to run them could be obtained. The Alcoholic Beverage Commission denied such permission because of the rules prohibiting all price advertisements of retail liquor. These rules ars as follows:

> 0100-3-.01(5)
>
> (c) Price
>
> An advertisement for distilled spirits shall not contain specific price for any item contained therein. Nor shall such advertisement contain phrases such as "specially priced," "reduced price," "new low price," "close-out price," "sale price,' or similar phrases of pecuniary appeal.
>
> 0100-3-.02(5)
>
> (e) Price
>
> An advertisement for wine shall not contain specific price for any item contained therein. Nor shall such advertisement contain phrases such as "specially priced," "reduced price," "new low price," "close-out price," "sale price," or similar phrases of pecuniary appeal.

Plaintiffs brought an action for declaratory judgment in the court below naming the ABC and the Tennessee Attorney General as defendants. The complaint asserted that

the regulations were invalid because they were in violation of the Free Speech Provisions of the First Amendment to the United States Constitution and Article I, Section 19 of the Tennessee Constitution. The Commission filed an answer which did not defend the constitutionality of the regulations and exhibited two written opinions of the Tennessee Attorney General to the effect that the regulations were unconstitutional.

The plaintiffs then filed a motion for a judgment on the pleadings, asserting that the regulations were invalid on their face. The plaintiffs asserted that the regulations violated the above constitutional provisions because they absolutely prohibited the communication of truthful information concerning lawful business transactions.

The Licensed Beverage Wholesalers of Tennessee, Inc., (LBWT) filed a motion to intervene supported by a proposed answer and accompanying affidavit which defended the constitutionality of the regulations. The answer asserted three justifications for the regulations: (1) That they promote temperance and lawful conduct because, in the absence of price advertising, residents of dry counties and municipalities would not be enticed into wet counties to purchase alcoholic beverages, and would not return to the counties of their residence in possession of such beverages in quantities in excess of that permitted by law; (2) that they discourage excessive consumption; (3) that they promote "orderly marketing" of liquor. The Chancellor granted the motion to intervene.

Without further pleading or order procedural steps being taken, the Chancellor entered an opinion holding the regulations unconstitutional. The opinion disclosed for the first time that the court had *sua sponte* converted plaintiffs' motion for judgment on the pleadings to a Rule 56 motion for summary judgment. (*See* Rules 12.03 and 56, Tenn. R. of Civ. P.)

The unusual history of this case during the pleading phase in the court below presents the threshold question on appeal. That is, whether the Chancellor erred in converting plaintiffs' motions for judgment on the pleadings into motions for summary judgment without notice to the intervenor.

The exact order of the procedural steps taken below is important. Plaintiff NPC filed a motion for judgment on the pleadings on April 23, 1981, accompanied by an affidavit from the advertising director of the NPC reflecting simply that if permission had been granted, the price information would have been run in both the *Tennessean* and the *Banner*. Four days later plaintiff Wise filed a similar motion. LBWT made a motion to intervene on May 1, 1981, and filed a proposed answer, counterclaim and affidavit. The affidavit was in support of its motion to intervene and focused on the impact to wholesalers of liquor price advertising. The trial court granted the motion to intervene on May 29, 1981 and, without further notice to the parties so far as the record reflects, awarded summary judgment to the plaintiffs on July 30, 1981.

The Chancellor's memorandum reflects his decision to treat the motions for judgment on the pleadings as motions for summary judgment. His error, if any, was in failing to notify the parties of the intended conversion and thereby failing to give the intervenor the opportunity to respond to the moving party's supporting materials. Rule 12.03 provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and *all parties shall be given reasonable opportunity to present*

> *all material made pertinent to such a motion by Rule 56.* [emphasis added]

The authority on this point is scarce. There are no Tennessee cases that address this issue, nor are there any federal cases which address the issue of notice with regard to the conversion of a motion for judgment on the pleadings to a motion for summary judgment. Federal courts, however, in general have examined the notice requirements of a conversion from a motion to dismiss pursuant to federal Rule 12(b)(6) [similar to our Rule 12.02(b)] to a motion for summary judgment. Tennessee Rule 12.02 and Federal Rule 12(b) provide:

> If, on a motion asserting the defense numbered (6) to dismiss for failure [of the pleading] to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and *all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.* [emphasis added]

The underlined language is identical to that contained in Rule 12.03 and has been interpreted by the federal courts to require that the court give some notice to all parties that it is treating the 12(b)(6) motion as one for summary judgment. *Crown Central Petroleum Corp. v. Waldman,* 634 F.2d 127, 129 (3rd Cir. 1980); *Davis v. Zahradnick,* 600 F.2d 458, 460 (4th Cir. 1979); *Jensen v. Klecker,* 599 F.2d 243, 245 (8th Cir. 1979); *Ohio v. Peterson, Lowry, Rall, Barber & Ross,* 585 F.2d 454, 456-57 (10th Cir. 1978); *Davis v. Howard,* 561 F.2d 565, 571-72 (5th Cir. 1977); *Macklin v. Butler,* 553 F.2d 525, 528 (7th Cir. 1977).

Each of the federal cases, upon finding that no notice had been given the parties of the conversion, remanded the cause to permit the non-moving party an opportunity

to establish the existence of material controverted facts. Clearly that is required on a conversion from a motion to dismiss to a motion for summary judgment.

We think the same rule applies to a motion for judgment on the pleadings which is treated by the trial court as a motion for summary judgment. In either case, notice should be given to all parties of the court's intention to treat the motions in that way. In that manner, all parties will be given an opportunity to show by affidavit or otherwise the existence of material controverted facts.

However, based on our analysis of the substantive issues in the following portions of this opinion, we are not convinced that the error affected the judgment of the court below or would result in prejudice to the judicial process. *See* Rule 36(b) of the Tenn. R. of App. P. Therefore, we will not reverse and remand for that reason and will proceed to consider the merits of this case.

Plaintiffs contend that the ABC's prohibition of all liquor price advertising, irrespective of time, place or circumstance, is an unconstitutional restraint upon lawful and truthful commercial communication, which violates the First Amendment to the United States Constitution and Article I, Section 19 of the Tennessee Constitution. Intervenor contends that the extraordinary power of the State, augmented by the Twenty-First Amendment, to regulate trade in beverage alcohol includes the power to prohibit mass media price advertising.

Commercial speech is protected by the First Amendment of the United States Constitution and Article I, Section 19 of the Tennessee Constitution. *Bigelow v. Commonwealth of Virginia,* 421 U.S. 809 (1975); *H & L Messengers, Inc. v. City of Brentwood,* 577 S.W.2d 444 (Tenn. 1979). Speech proposing no more than a commercial transaction enjoys a substantial degree of First Amendment protection: A state may not completely suppress the dissemination of truthful information about an

entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 773 (1976).

The U.S. Constitution accords commercial speech a lesser protection than other constitutionally guaranteed expression. *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557, 563 (1980). The protection available for particular commercial expression turns on the nature of both of the expression and of the governmental interests served by its regulation. *Id.* The United States Supreme Court has adopted a four-part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected speech.

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest and (3) directly advances that interest, (4) reaches no farther than necessary to accomplish the given objective. [citation omitted]

Metromedia, Inc. v. City of San Diego, 101 S.Ct. 2882, 2892 (1981)

There can be no dispute over the application of the first criterion. Mrs. Wise is lawfully engaged in the retail liquor trade and there is no suggestion that the ads she desires to run are misleading in any way.

Two governmental objectives which the intervenor claims are advanced by the regulations—discouraging the illegal possession of liquor in dry counties and discouraging excessive consumption—are substantial governmental goals. The third—promoting the orderly marketing of liquor—is hardly valid. Intervenor contends that price

advertising is cost effective only for the larger retail outlets. If such advertising is permitted, some smaller outlets will be driven out of business, resulting in a more concentrated retail distribution structure. The retail trade will become dominated by a few, high-volume outlets. This country is based on the free enterprise system. Intervenor cannot rely upon the anticompetitive effects of these regulations as a justification for the suppression of First Amendment rights.

The primary stumbling block for the intervenor is the application of the third criterion: Do the regulations directly advance the governmental interests? Clearly they do not. Governmental purposes, vital though they may be, must be achieved through direct regulation and not by keeping the public ignorant of truthful information.

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. . . . But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have re-enforced our view that it is. We so hold.

Virginia Citizens, 425 U.S. at 770.

It is contended that price advertising of liquor (1) would entice residences of dry counties to purchase liquor in wet counties and to subsequently possess it illegally in the counties where they reside, and (2) encourage excessive consumption. Both contentions are without merit.

The prohibition of price advertising does not directly advance either of these governmental goals. The ABC

regulations do not prohibit advertisement of the availability of liquor. Mrs. Wise and others lawfully engaged in the retail liquor trade may advertise their wares in as alluring a fashion as they desire. The only thing they may not do is tell the public the price of their products. The notion that the possession of liquor in dry counties or excessive consumption of liquor is effectively discouraged by permitting advertising of the availability, but not the price, of liquor is not even logical, let alone sufficient to meet constitutional requirements.

Further, in order to justify suppressing an advertisement on the basis that it promotes illegal conduct, it would be necessary for the intervenor to show that price advertisements are "directed toward" inciting "imminent lawless conduct" and that they are "likely" to produce such conduct. *Carey v. Population Services, Int'l.* 431 U.S. 678, 701 (1977). The intervenor cannot meet this standard. The most that can be said about such advertisments is that they state the terms of entirely legal transactions, but that one of the parties to such a transaction could by entirely independent action, elect to commit a violation of the law involving goods procured in the transaction. Such tenuous connections cannot be said to constitute incitement of criminal conduct, imminent or otherwise. If they could, a very wide range of commercial transactions, including the lawful sale of guns, butcher knives, and prescription drugs, would be subject to advertising bans.

Even if the remaining governmental goal of the regulations—the orderly marketing of liquor—is deemed by the court to be substantial it cannot meet this third criterion. Controlling the composition of the retail liquor dealers and their stock is not directly advanced by keeping the public in ignorance of the pricing structure. In *Virginia Citizens* the U.S. Supreme Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The court noted that "[t]he advertising ban does not directly

affect professional standards one way or the other." 425 U.S. at 769.

The situation here is comparable. The number of retail liquor dealers and the composition of their stock is only remotely affected by price advertising.

Since the governmental objectives advanced by the intervenor are not directly advanced by the prohibition of price advertising there is no need to examine the breadth of the restriction as required by the fourth criterion. It is irrelevant that restrictions which only indirectly advance substantial governmental goals reach no farther than is necessary to accomplish those goals.

It is clear that the challenged regulations are violative of the First Amendment of the United States Constitution under the four part test outlined in *Central Gas* and reiterated in *Metromedia*. The Tennessee Supreme Court has not specifically held that Article I, Section 19 of the Tennessee Constitution is co-extensive with the First Amendment in its protection of commercial speech but such result is suggested by *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 453 (Tenn. 1979).

Intevenor [*sic*] tacitly concedes that apart from the regulatory authority granted by the Twenty-First Amendment the state cannot constitutionally prohibit price advertising on beverage alcohol. It contends, however, that the ultimate balance between governmental and private interests cannot be struck without consideration of the enhanced regulatory power applicable to beverage alcohol.

The power reserved by the Twenty-First Amendment mainly relates to the "transportation and importation" of liquor. While it has some application to other phases of the liquor business, its importance lessens as the connection between the regulated activity and transportation and importation becomes more tenuous. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Moreover, the Twenty-First

Amendment is primarily a limitation upon the authority granted by the Commerce Clause. Whether it has any significant effect upon the exercise of rights secured by the Bill of Rights is at least "doubtful." *Craig v. Boren*, 429 U.S. 190, 206 (1976).

In any event the intervenor's reliance upon the Twenty-First Amendment as a qualification of the rights secured by the First Amendment completely overlooks the guarantees of free expression contained in Article I, Section 19 of the Tennessee Constitution. Even assuming that the regulatory authority reserved to the states by the Twenty-First Amendment qualifies First Amendment rights in a manner material to this case, there can be no similar qualification of the freedom of expression reserved by the Tennessee Constitution. Note, for example, *Bellanca v. New York State Liquor Authority*, 54 N.Y.2d 228, 445 N.Y.S.2d 87, 429 N.E.2d 765 (1981) *Bellanca* is a decision of the New York Court of Appeals upon remand of the case from the U.S. Supreme Court. The Supreme Court had held that a ban on topless dancing was valid under the First Amendment, in part because of the regulatory right reserved to the states by the Twenty-First Amendment. On remand, the New York Court of Appeals held the ban invalid under the New York State Constitution, notwithstanding its validity under the United States Constitution, stating:

> Although that statutory ban has been held to be valid under the Federal Constitution in consequence of the provisions of its Twenty-first Amendment, it is invalid under the guarantee of freedom of expression of our State Constitution, to which the Twenty-first Amendment has no application.

429 N.E.2d at 766.

On the Federal level, the contest between freedom of expression and the state's authority to regulate liquor is a constitutional one, pitting the policy of the First Amendment against the policy of the Twenty-First Amendment.

On the state level, there is no such contest, since the Tennessee Constitution guarantees freedom of expression, but contains no provisions relating to the transportation or sale of alcoholic beverages.

The decision of the lower court is affirmed and the case is remanded for any further necessary proceedings. The costs are taxed to the appellants.

AFFIRMED AND REMANDED.

/s/ Ben H. Cantrell
BEN H. CANTRELL

CONCUR:

/s/ Henry F. Todd
HENRY F. TODD
Presiding Judge, M.S.

/s/ Lewis H. Conner, Jr.
LEWIS H. CONNER, JR.
Judge

No. 94-1247

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.,

Petitioner,

v.

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BUREAU OF LIQUOR CONTROL ENFORCEMENT,

Respondent.

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On Petition For Writ Of Certiorari
To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Twenty-first Amendment confers an added presumption of validity upon Pennsylvania's alcohol price advertising ban and shields such ban from a commercial speech balancing test review?

2. Whether First Amendment protection of commercial speech applies to Pennsylvania's alcohol price advertising restriction in light of Pennsylvania's absolute power to totally ban the sale of alcohol?

3. Whether advertising proscriptions of products such as alcoholic beverages, which can be totally prohibited by the state, pass muster under the *Central Hudson* commercial speech test as a matter of law so long as the restrictions are reasonably related to the governmental purpose in limiting consumption?

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On Petition For Writ Of Certiorari
To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Pennsylvania State Police, Bureau of Liquor Control Enforcement, respectfully requests that

this Court deny the Petition for Writ of Certiorari submitted by petitioners.

STATEMENT OF THE CASE

A. Procedural History and Proceedings Below

The respondent, Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), is the agency responsible for enforcing the Liquor Code, Pa. Stat. Ann. tit. 47 §§ 1-101, *et seq.* Petitioners are holders of restaurant liquor licenses issued by the Pennsylvania Liquor Control Board ("Board"). Each of the petitioners had advertised, in a local newspaper, the prices of alcoholic beverages offered for sale in its licensed establishment.[1] In response, the Bureau issued non-criminal administrative citations to each petitioner. The Bureau charged petitioners with violating Section 498 of the Liquor Code, which prohibits the advertisement of the price of any malt beverage, cordial, wine or distilled liquor offered for sale in this Commonwealth.[2]

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[1] As an illustration, the advertisement at issue in *Hospitality II* stated in part: "No cover and 50¢ drinks for the ladies, 10 to 12 midnight." See App. to Pet. for Cert. (hereinafter "App."), 38a.

[2] This prohibition applies to all manufacturers, wholesalers, *retailers*, shippers and Pennsylvania licensees. See Section 498(a). Petitioners recognize that the Pennsylvania Liquor Control Board is a *retailer* of wine and distilled liquor. Pet. for Cert., pp. 4, 16. However, petitioners assert that the Board is exempt from the purview of Section 498. No Pennsylvania court has agreed with petitioners' conclusion.

Evidentiary hearings relative to the citations were held before an Administrative Law Judge ("ALJ"). The petitioners did not contest the fact that the advertisements violated Section 498, but relied solely on the argument that Section 498 abridged their First Amendment rights of commercial speech. The ALJ issued adjudications finding that each petitioner had violated Section 498. The ALJ noted that although she did not have the authority to address petitioners' constitutional challenge, Section 498 was born in the legislature out of a belief that price advertising promoted consumption and that promoting consumption of alcohol was inconsistent with the Liquor Code's purpose of restraining the sale of liquor. App. 43a.

Petitioners appealed to the Board. In dismissing the appeals, the Board recognized that it did not have the authority to constitutionally interpret its own statutes. However, the Board concluded that "promoting consumption through off-premise (sic) advertising is inconsistent with the purpose of the Liquor Code in restraining the sale of liquor." App. 33a, 35a.

Petitioners appealed to the Court of Common Pleas of Philadelphia County, Pennsylvania. The Court held that Section 498 violated the Pennsylvania Constitution but did not address the First Amendment issue. The Bureau appealed to the Commonwealth Court of Pennsylvania and the cases were transferred to the Supreme Court of Pennsylvania.

The Pennsylvania Supreme Court, relying on three decisions by this Court, held that Pennsylvania's price advertising ban as set forth in Section 498 did not abridge

any First Amendment rights to commercial speech. *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc.*, ___ Pa. ___, 650 A.2d 854 (1994) ("*Hospitality*"). The Pennsylvania Supreme Court agreed with the Liquor Control Board that Section 498 was consistent with the purpose of the Liquor Code in restraining the sale of liquor. App. 4a.

Two separate dissenting opinions were authored by Justices Flaherty and Castille. Neither of the dissenting Justices found that Pennsylvania's price advertising ban violated petitioners' First Amendment rights to commercial speech. Justice Flaherty stated that "there may be no federally protected right of commercial speech on the facts of this case under the First Amendment to the United States Constitution. . . . " App. 15a. In his dissenting opinion, Justice Castille advocated the application of a *Central Hudson* analysis. He was troubled with the Bureau's failure to introduce, at the common pleas court level, empirical evidence to support the link between alcohol price advertising and consumption. App. 12a-13a. Justice Castille would have remanded the case to the trial court to allow the Bureau the opportunity to present evidence relative to the third and fourth prongs of the *Central Hudson* test. App. 13a.

B. The Legislative History of Section 498.

Section 498 was added to the Pennsylvania Liquor Code in 1987. This amendment was co-sponsored by State Senators Madigan and Wilt. Upon offering this alcohol

price advertising restriction for the legislature's consideration, Senator Madigan summarized its purpose as follows:

> Many people in the Bible Belt of this state who support liquor control feel that such advertising would have an impact on the consumption of alcohol and, therefore, I am pleased to urge support for this amendment. Pa. Senate, Legis. J, June 17, 1987; App. 88a.

Petitioners misstate the legislative history when they assert that Section 498 was adopted for the purpose of economic protectionism. Pet. for Cert., pp. 4, 16, 19. While a single state senator, who asked for permission to become a co-sponsor of the bill after it had already been introduced onto the floor, expressed his concern for small distributors as an ancillary reason for passage, App. 89a, it is clear that the primary purpose of Section 498 as stated by Senator Madigan was to restrain and discourage the consumption of alcoholic beverages.

Petitioners' statement that the "government" of Pennsylvania expressly concluded in 1985 that there is no casual connection between price advertising and consumption is misleading and erroneously based upon documents not of record in this case. Pet. for Cert. pp. 5, 20. Pennsylvania's legislative body, the General Assembly, has *never* concluded that there is no link between price advertising and excessive consumption. As set forth above, the Pennsylvania legislature reached the opposite conclusion through its enactment of Section 498. The non-record information relied upon by petitioners shows that in 1985, the Antitrust Section of the Pennsylvania Attorney General's Office hired *one* expert who prepared a

report concluding that the disadvantages of *beer* price advertising are minimal. App. 58a. This report was never considered or adopted by the Pennsylvania legislature.

Petitioners' reference to the 1985 Liquor Control Board Order rescinding a Board regulation that had prohibited beer price advertising by certain license holders is also misleading and based upon documents not of record in this case. Moreover, in reviewing the challenge to Section 498 in the instant cases, the Pennsylvania Liquor Control Board specifically concluded that promoting alcohol consumption through off-premises price advertising is inconsistent with the Code's purpose of discouraging the sale of liquor.[3]

SUMMARY OF ARGUMENT

The decision of the Pennsylvania Supreme Court is consistent with the approach taken by this Court in several prior decisions wherein liquor related regulations were challenged on First Amendment grounds. Additionally, numerous federal courts of appeal and state courts of last resort have rejected commercial speech challenges to alcohol advertising restrictions. The decision of the Pennsylvania Supreme Court is in accord with

[3] The Bureau objects to the inclusion of the Attorney General's report and to the Liquor Control Board Order in the Petition for Writ of Certiorari. These documents were never introduced as evidence or made part of the record below.

the ultimate result reached by these state and federal courts and follows the reasoning employed by this Court.

REASONS FOR DENYING THE WRIT

I.

THE PENNSYLVANIA SUPREME COURT'S HOLDING THAT PENNSYLVANIA'S ALCOHOL PRICE ADVERTISING BAN NEED ONLY BEAR A REASONABLE RELATION TO THE PURPOSE OF THE PENNSYLVANIA LIQUOR CODE IN ORDER TO SURVIVE A FIRST AMENDMENT COMMERCIAL SPEECH CHALLENGE IS CONSISTENT WITH THE REASONING APPLIED BY THIS COURT IN SEVERAL PRIOR DECISIONS

Contrary to the assertions of petitioners, the reasoning applied by the Pennsylvania Supreme Court in dismissing petitioners' First Amendment attacks is not novel or remarkable. The Pennsylvania Supreme Court followed the approach taken by this Court in three prior decisions wherein liquor related statutes or regulations were challenged on First Amendment grounds.

The Pennsylvania Court held that the cases of *California v. LaRue*, 409 U.S. 109 (1972) ("*LaRue*"), *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) ("*Bellanca*"), and *City of Newport, Ky. v. Iacobucci*, 479 U.S. 92 (1986) ("*Iacobucci*"), clinched the argument for reviewing the advertising restriction under a reasonable relation standard as opposed to applying a *Central Hudson* balancing test. App. 5a.

In *LaRue*, *Bellanca* and *Iacobucci*, proprietors of establishments licensed to sell liquor contended that state or

local regulations prohibiting sexual entertainment or topless dancing in licensed premises deprived them of their rights under the First Amendment to the United States Constitution. Nude or topless dancing has been recognized by this Court as a form of expressive activity protected by the First Amendment. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). Although First Amendment challenges normally require a careful balancing of competing interests,[4] this Court refused to adopt such an approach in *LaRue, Bellanca* and *Iacobucci* ("*LaRue, et al.*"). In each of those cases, this Court shielded the liquor regulation in question from full First Amendment review. The Court rejected the free speech claims by finding that the Twenty-first Amendment confers an added presumption of validity in favor of a liquor regulation and that a state legislature or regulatory agency is entitled to enact reasonable restrictions in the liquor area in order to advance the asserted governmental interests.

The Pennsylvania Supreme Court followed the approach taken by this Court in *LaRue, et al.* and declined to apply the commercial speech analysis as set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), noting that commercial speech is generally accorded less protection than other forms of expression. See *U.S. v. Edge Broadcasting Co.*, 113 S.Ct. 2696, 2703 (1993) ("*Edge*"). As noted by the

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[4] See *Schad v. Mount Ephraim*, 452 U.S. 61 (1981); *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*"); and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). In *Barnes* a *non-liquor* regulation restricting nude dancing was challenged on First Amendment grounds. This Court applied the four-part balancing test as enunciated in *O'Brien*.

Pennsylvania Supreme Court, it would be illogical "to apply a rigorous First Amendment analysis where a liquor regulation is attacked on commercial speech grounds when such an analysis has not been utilized relative to speech which is usually accorded greater protection."[5] App. 5a.

Petitioners' argument that the Pennsylvania Supreme Court erred in expanding *LaRue, et al.* to a restriction on commercial speech is misplaced. Such a position erroneously reads this Court's trilogy of cases too narrowly and restrictively. The approach taken in *LaRue, et al.* is not limited solely to restrictions on sexual entertainment and topless dancing. The basis underlying the Court's holdings in *LaRue, et al.* was not the nature of the activity proscribed by the regulation, but rather the Twenty-first Amendment and the added presumption of validity which that Amendment confers on restrictions in the liquor area. In *LaRue, et al.*, this Court never qualified or confined the Twenty-first Amendment's broad sweep only to restrictions involving sexually related entertainment, dancing or expressive conduct. To the contrary, this Court's statements in *LaRue, et al.* make it clear that the presumptive effect of the Twenty-first Amendment extends to any and all reasonable liquor regulations. "Consideration of *any* state law regulating intoxicating

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[5] Even if expressive conduct does not occupy a greater position than commercial speech on the scale of First Amendment values, surely commercial speech of a product which a state can totally ban should not be afforded any greater protection than expressive conduct.

beverages must begin with the Twenty-first Amendment. . . . " *LaRue,* 409 U.S. at 114, (quoting *Joseph E. Seagram & Sons v. Hostetter,* 384 U.S. 35, 41 (1966)) (Emphasis added). "It is equally well-established that a state has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold." *Bellanca,* 452 U.S. at 715. "[T]he case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment. . . . " *LaRue,* 409 U.S. at 115. "Given the added presumption in favor of the validity of the . . . regulation in this area that the Twenty-first Amendment requires. . . . " *Iacobucci,* 479 U.S. at 97 (quoting *LaRue,* 409 U.S. at 118-119).

In light of this Court's numerous unequivocal references to the presumptive validity of liquor regulations and the absence of any language in *LaRue, et al.* limiting the Twenty-first Amendment's effect to nude dancing restrictions, the Pennsylvania Supreme Court's decision was consistent with this Court's approach whereby a liquor regulation is shielded from a rigorous First Amendment analysis.

The Pennsylvania Supreme Court's approach in concluding that Section 498 bore a reasonable relation to the legislature's goals in this area is also in accord with this Court's actions in *LaRue, et al.* Petitioners' argument that the Bureau offered no expert testimony or empirical evidence to prove that Pennsylvania's ban on alcohol price advertising advances the legislature's goals in this area is misplaced and erroneously relies upon evidence not of

record in this case.[6] Pet. for Cert. pp. 8, 20. In *Bellanca* this Court found that New York's topless dancing restriction was reasonable in the absence of any specific evidence establishing a nexus between the regulation and New York's goals in the area of alcohol control. The Court, in deferring to the legislature's stated purpose for the regulation, stressed that this policy judgment should be upheld as long as it appeared reasonable. *Id.*, at 718. Likewise, in *Iacobucci* the municipality's stated purpose for the restriction as set forth in the preamble to the ordinance was sufficient justification. This Court did not consider it necessary for the city to introduce any evidentiary findings in support of the regulation.

As noted above, the purpose of Pennsylvania's price advertising proscription is to restrain the consumption of alcohol. App. 88a. The purpose of Pennsylvania's regulatory legislation in this area has always been to restrain the sale of liquor. See *Application of El Rancho Grande Inc.*, 496 Pa. 496, 437 A.2d 1150 (1980). Both the ALJ factfinder and the Liquor Control Board, the agency responsible for controlling the sale and consumption of alcoholic beverages in Pennsylvania, recognized that consumption would be promoted through off-premises advertising and that such promotion was inconsistent with the purpose of

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[6] Petitioners contend that the Commonwealth of Pennsylvania has explicitly concluded that beer price advertising does not cause increased consumption. Petitioners rely upon a report prepared by the Antitrust Section of the Pennsylvania Attorney General's Office and upon a Board Order Adopting Regulations, neither of which was introduced into evidence in this case. As set forth above, reference to these documents is inappropriate because they were never made a part of the record below.

the Liquor Code in restraining the sale of liquor. App. 33a, 43a. Given the well-recognized link between the advertising of a product and the increased demand for that product,[7] the Pennsylvania Court properly concluded that the legislature's judgment in enacting Section 498 was reasonable. No explicit evidentiary findings are needed in order to sustain Pennsylvania's ban on price advertising. The Pennsylvania Court's reliance upon the legislature's articulated purpose behind Section 498, which was recognized by the ALJ and the Liquor Control Board, was consistent with this Court's decisions in *Bellanca* and *Iacobucci*.

This Court has ruled in three separate cases that the Twenty-first Amendment confers an added presumption of validity in favor of liquor regulations and such regulations will be upheld if they bear a reasonable or rational link to the government's asserted purpose in enacting the regulations. The Pennsylvania Supreme Court properly relied upon *LaRue, et al.* in addressing petitioners' challenges to Pennsylvania's alcohol price advertising ban. Since the Pennsylvania decision was based upon prior

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[7] See *Central Hudson*, 447 U.S. at 569 ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales.") and *Posadas DePuerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341-342 (1986) ("*Posadas*") ("The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised.")

precedent of this Court, review of these cases is not warranted.

II. THE RESULT REACHED BY THE PENNSYLVANIA SUPREME COURT IS CONSISTENT WITH THIS COURT'S BINDING AND CONTROLLING DECISION IN *QUEENSGATE*

Petitioners contend that Pennsylvania's price advertising prohibition violates their right to commercial speech as analyzed under a *Central Hudson* balancing test. However, the argument that an alcohol price advertising ban violates the First Amendment by suppressing commercial speech has already been rejected by this Court by virtue of its summary dismissal in *Queensgate Investment Co. v. Liquor Control Commission*, 69 Ohio St.2d 361, 433 N.E.2d 138, *appeal dismissed*, 459 U.S. 807 (1982) ("*Queensgate*").

In *Queensgate*, a liquor permit holder argued that an Ohio liquor regulation which prohibited off premises alcohol price advertising was an impermissible infringement of its First Amendment right to commercial speech. The Ohio Supreme Court applied the analysis delineated in *Central Hudson* and held that the regulation did not violate the First Amendment. Queensgate filed a timely appeal to this Court. In its Jurisdictional Statement, Queensgate framed the issue as follows:

> Whether Regulation 4301:1-1-44 of the Ohio Liquor Commission, which prohibits a duly licensed retail liquor permit holder from advertising the retail price of alcoholic beverages in any medium visible from outside the premises, violates the First and Fourteenth Amendments

> of the Constitution of the United States by suppressing the public dissemination of truthful information about a lawful activity." Jurisdictional Statement at 1, *Queensgate*.

The Liquor Control Commission filed with the Court a motion to dismiss on the ground that the question was so unsubstantial as not to warrant further argument. This Court subsequently dismissed Queensgate's appeal "for want of a substantial federal question." *Queensgate*, 459 U.S. 807.

This Court has consistently ruled that a summary dismissal of an appeal for want of a substantial federal question is a decision on the merits of a case. *Hicks v. Miranda*, 422 U.S. 332 (1975). Summary dispositions are binding on lower courts and their precedential effect extends to the precise issues presented and necessarily decided by those actions. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*"Mandel"*).

The precise issue presented in *Queensgate*, as articulated in the Jurisdictional Statement, was whether an Ohio liquor regulation, which prohibited a retail license holder from advertising the price of alcoholic beverages in any medium visible from outside the premises, violated the First Amendment because it suppressed commercial speech. The petitioners contend that the statute at issue in the instant cases, Section 498 of the Pennsylvania Liquor Code, which prohibits a liquor license from advertising in any manner whatsoever the price of any alcohol offered for sale, violates their First Amendment rights to commercial speech.

Queensgate and the instant matters involve identical issues. In both cases, there is a liquor regulation prohibiting license holders from advertising in any medium the price of any alcoholic beverages offered for sale. The constitutional challenge in both cases is identical – whether the ban violates the license holder's commercial speech rights.

The Pennsylvania and Ohio courts upheld their respective price advertising bans on the premise that the state acting under its broad powers granted by the Twenty-first Amendment can legislatively conclude that there is a rational link between discount price advertising of a product and the demand for that product. Although the *Queensgate* Court applied a *Central Hudson* test in upholding Ohio's ban while the Pennsylvania Court followed the reasonable relation analysis pursuant to *LaRue, et al.*, this distinction does not take the instant cases out of the *Queensgate* sphere. This Court has stated that a summary disposition has precedential effect, but not necessarily on the identical reasoning of the court. *Mandel*, 432 U.S. at 176. Thus, regardless of the reasoning employed by the Ohio Supreme Court in arriving at its ruling, this Court's *Queensgate* decision stands for the proposition that a state's alcohol price advertising ban does not violate First Amendment commercial speech protection.

This Court's partial reliance on *Queensgate* in its recent decision in *Edge*, 113 S.Ct. at 2707, should erase any doubt as to *Queensgate's* soundness and continued vitality. Moreover, although this Court is not bound by its summary dispositions, *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981), the issue in *Queensgate* need not be revisited because the propriety of *Queensgate*

is buttressed by this Court's decision in *LaRue, et al.*, as discussed herein.[8]

Since the result reached by the Pennsylvania Supreme Court is consistent with this Court's decision in *Queensgate*, full plenary consideration by this Court is not warranted.

III. THE PENNSYLVANIA SUPREME COURT'S HOLDING IS CONSISTENT WITH THE ULTIMATE RESULT REACHED BY ALL STATE COURTS OF LAST RESORT AND ALL FEDERAL APPEALS COURTS THAT HAVE ADDRESSED FIRST AMENDMENT CHALLENGES TO ALCOHOL ADVERTISING RESTRICTIONS

Petitioners urge this Court to consider full review by erroneously arguing that the Pennsylvania Court's "unprecedented holding" aggravates an existing split of authority in the federal and state courts. Pet. for Cert. p. 11.

Petitioners exaggerate the import of the Pennsylvania Supreme Court's decision and rely upon an alleged split of authority that refers more to the manner in which the state and federal courts have arrived at their decisions

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[8] The issue involved in *LaRue, et al.* and *Queensgate* concerned the tension between the First and Twenty-first Amendments. In each of those cases, this Court rejected the argument that a liquor regulation was unconstitutional because such regulation restricted a lesser form of First Amendment speech. Thus, contrary to the petitioners' contention, the authority in this area appears clear and well-settled.

rather than the reasoning employed by these courts and the ultimate holdings.

Numerous federal courts of appeals and state courts of last resort have addressed commercial speech challenges to alcohol advertising restrictions. These courts have consistently upheld the constitutionality of the advertising restrictions at issue.[9] See *44 Liquormart, Inc. v. Rhode Island*, 39 F.2d 5 (1st Cir. 1994); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691 (1984); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984) ("*Dunagin*"); *Queensgate, supra; Hospitality, supra.* While each of these courts may have employed slightly different standards in reviewing the challenged regulation, there is a commonality of reasoning which suggests that there is more uniformity in this area than petitioners are willing to admit.

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[9] In support of their claim of a split of authority, petitioners refer to *Michigan Beer and Wine Wholesalers Association v. Attorney General*, 370 N.W.2d 328 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986), which was not a decision from the Michigan Supreme Court but rather a three judge panel opinion of Michigan's intermediate appellate court. Likewise, *Wise v. Tennessee Alco. Bev. Comm'n*, No. 81-325-I, (Tenn. Ct. App., Apr. 13, 1982), was a three judge panel decision from Tennessee's intermediate appellate court. Petitioners' reliance on *Dunagin* is misplaced because in that case the ultimate holding of eight out of thirteen judges was consistent with the result reached by the Pennsylvania Supreme Court.

First, the state and federal courts have unanimously found that promoting temperance by reducing the demand for alcoholic beverages is a legitimate and substantial governmental purpose. Second, the lower courts have consistently held that restrictions on the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages. This conclusion has not been based upon any evidentiary findings or empirical evidence. Rather the state and federal courts have invariably arrived at this holding after deferring to the judgment of the state legislature or after recognizing the inherent connection between advertising and demand. Third, these courts have found that the legislature's choice of using an advertising restriction to achieve its goals of temperance is a reasonable one. Fourth and most importantly, the highest state courts and federal appeals courts have uniformly held that an advertising restriction does not violate commercial speech rights.

As set forth above, there is a surprising unanimity in the conclusions reached by the state and federal courts on the fundamental issues involved when an alcohol price advertising restriction is challenged on commercial speech grounds. Moreover, the Pennsylvania Court's approach is not so much a departure from the approach taken by these other courts as it is a rearrangement of the same essential inquiry. As is done in a case involving a commercial speech analysis, the Pennsylvania Supreme Court looked at the asserted governmental interest underlying Section 498, determined that it is intended to restrain and discourage the consumption of alcoholic beverages, and found this to be "a legitimate legislative purpose." App. 4a.

The last two steps of a *Central Hudson* analysis focus on whether the regulation directly advances the governmental interest asserted and whether it is more extensive than necessary. These last two steps of the *Central Hudson* analysis basically involve a consideration of the "fit" between the legislature's ends and the means chosen to accomplish those ends. The "fit" need not be perfect, only reasonable. *Edge*, 113 S.Ct. at 2704-2705. The Pennsylvania Supreme Court concluded as did the factfinder and Liquor Control Board below that it was reasonable to accept that banning price advertising is consonant with the legislature's purpose of restraining the consumption of alcoholic beverages. The Court noted that the nature of price advertising is to encourage consumption by promoting sales. App. 4a. Consequently, the Court held that Section 498 bore a reasonable relation to the legitimate legislative goals in the area of alcohol control.

The decision of the Pennsylvania Supreme Court and the decisions of the other state and federal appeals courts are consistent in that they are grounded on the absolute power of the states to totally ban the sale of alcoholic beverages pursuant to the Twenty-first Amendment. See *Bellanca*, 452 U.S. at 715. Regardless of the slight differences in the tests or analyses used by the courts in addressing a commercial speech challenge to an alcohol advertising restriction, the ultimate decision upholding the regulation is explicitly or implicitly premised on the theory that a state's power to totally ban the sale of

alcohol includes the lesser power to dampen demand by placing restrictions on advertising.[10]

In *Posadas* this Court specifically referred to this theory and emphasized that it is because the government could have enacted a wholesale prohibition on the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct but reducing the demand through restrictions on advertising. This Court noted that it would be a strange constitutional doctrine which would concede to the legislature the authority to ban a product but deny to the legislature the authority to forbid the stimulation of demand for the product by advertising.

> Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages and prostitution, has varied from outright prohibition on the one hand (citations omitted), to legalization of the product or activity with restrictions on stimulation of its demand on the other hand (citations omitted). To rule out the latter, intermediate kind of response would require more than we find in the First Amendment. 478 U.S. at 346-347.

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[10] In *Dunagin* two judges agreed with the result reached by the majority but could not join in the majority opinion because of the majority's reliance on the Twenty-first Amendment in giving the alcohol advertising restriction at issue a substantial amount of deference. The concurring judges stressed that the regulation should be upheld on Mississippi's broad "police power". However, the concurring opinion concluded by stating that since "states can ban the sale of liquor entirely," they can place "restriction(s) on commercial exploitation by way of advertising. . . . " *Dunagin*, 718 F.2d at 754-755.

Since the decision of the Pennsylvania Supreme Court is consistent with the reasoning of this Court in *Posadas*, there is no compelling reason for the grant of certiorari.

CONCLUSION

For the reasons set forth herein, the Pennsylvania State Police, Bureau of Liquor Control Enforcement respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 94-1247

In the Supreme Court of the United States

OCTOBER TERM, 1994

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v.
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BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

NIGHTTIME CONCEPTS, INC.,
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On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITIONERS' REPLY BRIEF

INTRODUCTION

The brief of the government of Pennsylvania is most significant for what it leaves undisputed. The government apparently agrees that no court other than the Supreme

Court of Pennsylvania has relied on the Twenty-first Amendment to eliminate all First Amendment protection for advertisers of alcohol beverages. Nor does the government dispute that the Pennsylvania Court's "reasonable relation" test lies at one extreme of an irreconcilable array of tests applied by the federal and state courts to governmental restrictions on alcohol beverage advertising. The government also does not question the importance of the question presented by this petition—the unresolved tension between two amendments to the federal Constitution. Nor does the government dispute that truthful price advertising, such as that banned by Section 4-498, Pa. Stat. Ann. tit. 47, § 4-498 (1969 & Supp. 1994), is at the heart of the commercial speech doctrine. Thus, this case is entirely appropriate for a grant of *certiorari* from this Court.

Instead of explaining why this petition should be denied, the government anticipates briefing on the merits by offering three erroneous arguments to justify the Pennsylvania Court's unprecedented decision: (i) that its "reasonable relation" test for judging restrictions on commercial speech is required by this Court's decisions in *California v. LaRue*, 409 U.S. 109 (1972) ("*LaRue*"), *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) ("*Bellanca*"), and *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92 (1986) ("*Iacobucci*"); (ii) that these cases are controlled by this Court's summary dismissal in *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982) ("*Queensgate*"); and (iii) that the Pennsylvania Court's "reasonable relation" test is actually no different than the *Central Hudson* test as it has been applied by other lower courts to restrictions on alcohol beverage advertising. These arguments, which purportedly support the Pennsylvania Court's radical decision to deprive an entire industry of First Amendment protection, should be addressed by this Court through the granting of this petition.

REPLY TO RESPONDENT'S ARGUMENTS

I. THE PENNSYLVANIA COURT'S UNDULY EXPANSIVE READING OF *LaRUE, ET AL.* IS IN CONFLICT WITH EVERY OTHER RELEVANT DECISION

In the government's erroneous view, the Pennsylvania Court's decision to strip petitioners' truthful commercial speech concerning alcohol beverages of all First Amendment protection follows directly from *LaRue, Bellanca* and *Iacobucci* ("*LaRue, et al.*"). Brief in Opp. at 7. But *LaRue, et al.* set forth a single, narrow exception to this Court's Twenty-first Amendment jurisprudence where States restrict marginal expressive conduct in the form of sexual entertainment on premises licensed to sell alcohol. *See* Petition at 15. The Pennsylvania Court stands alone in reading *LaRue, et al.* as elevating the Twenty-first Amendment into a supremacy clause for the States.

According to the government, "*LaRue, et al.* make it clear that the presumptive effect of the Twenty-first Amendment extends to *any and all* reasonable liquor regulations." Brief in Opp. at 9 (emphasis supplied). This Court, however, consistently has rejected arguments that the Twenty-first Amendment qualifies individual constitutional rights in the area of alcohol regulation. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (First Amendment establishment clause rights); *Craig v. Boren*, 429 U.S. 190, 207 (1976) (equal protection rights); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (due process rights); *see 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987) ("The States' Twenty-first Amendment powers, though broad, are circumscribed by other provisions of the Constitution."); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Quite understandably, not one of the foregoing authorities appears in the government's brief.

Although the other lower courts disagree about the precedential value of *LaRue, et al.* (*see* Petition at 16-

17), no court shares the Pennsylvania Court's extreme view that those decisions require application of a "reasonable relation" test to all regulations in the so-called "liquor area." Brief in Opp. at 8. Indeed, every other lower court that has reviewed a restriction on alcohol beverage advertising—and every one cited by the government—has purported to apply the *Central Hudson* test. *See 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3518 (U.S. Dec. 27, 1994) (No. 94-1140); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227 (E.D.N.Y. 1993); *Michigan Beer & Wine Wholesalers Ass'n v. Attorney Gen.*, 370 N.W.2d 328 (Mich. Ct. App. 1985), *appeal denied*, 424 Mich. 878, *cert. denied*, 479 U.S. 939 (1986) ("*Michigan Beer*"); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Queensgate*, 433 N.E.2d 138; *Wise v. Tennessee Alco. Bev. Comm'n*, No. 81-325-1 (Tenn. Ct. App. Apr. 13, 1982), App., *infra*, 98a-109a.

Because no other court concurs with the Pennsylvania Court's interpretation of *LaRue, et al.*, the government's reliance on those decisions is unavailing. Rather than justify the Pennsylvania Court's decision, the government instead has underscored the need for this Court to resolve the conflicting applications of *LaRue, et al.* by the lower courts.

II. THIS COURT'S SUMMARY DISMISSAL IN *QUEENSGATE* DOES NOT SUPPORT THE PENNSYLVANIA COURT'S DECISION

In another attempt to place the Pennsylvania Court's decision within the mainstream of relevant constitutional precedent, the government argues that the issue presented in these cases already has been decided by this Court in its summary dismissal in *Queensgate*. But *Queensgate*

has no precedential effect here and was not even relied on by the Pennsylvania Court.

Summary dismissals "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Thus, this Court's summary dismissal in *Queensgate* cannot support the Pennsylvania Court's creation of a completely new test for reviewing governmental restrictions on alcohol beverage advertising. Rather, the summary dismissal must be read as consistent with the then-established principle that the Twenty-first Amendment does not "qualif[y] individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." *Craig v. Boren*, 429 U.S. at 206.

Further, the precedential effect of summary dismissals is limited to "the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. at 176. Both the constitutional and the factual issues presented in *Queensgate* distinguish it from these cases. In *Queensgate*, the constitutional question only concerned whether *Central Hudson* had been applied properly. 433 N.E.2d at 141-42. Here, the principal constitutional question is whether the Twenty-first Amendment mandates that a "reasonable relation" test, rather than *Central Hudson*, applies when a government restricts commercial speech that concerns alcohol beverages. Unlike the questions presented here, the jurisdictional statement in *Queensgate* did not even mention the Twenty-first Amendment. Brief in Opp. at 13-14.

The summary dismissal in *Queensgate* also has no precedential impact here because it arose from significantly different facts. The government is simply wrong in stating that both *Queensgate* and these cases involve "a liquor regulation prohibiting license holders from advertising in any medium the price of any alcohol beverages offered for sale." Brief in Opp. at 15. Although

that is a reasonably accurate description of Pennsylvania's Section 4-498, the challenged regulation in *Queensgate* expressly *permitted* price advertising in virtually every advertising medium unless it referred to "price advantage." *Queensgate*, 433 N.E.2d at 139 n.1. Further, unlike these cases, the factual record in *Queensgate* did not contain unequivocal concessions by the government that alcohol beverage price advertising does *not* cause increased consumption. *See Report to the Pennsylvania Liquor Control Board on Beer Price Advertising* (Pa. Commw. Office of Att'y Gen. Antitrust Section, July 31, 1985) ("Attorney General's Report"), App., *infra*, 50a; Order Adopting Regulations (Pa. Liquor Cont. Bd., Sept. 4, 1985) ("Liquor Board Order"), App., *infra*, 78a.[1] Because *Queensgate* did not present the "precise issues" as presented in these cases, this Court's summary dismissal does not support the Pennsylvania Court's decision to deprive petitioners' truthful price advertising of First Amendment protection. *See Mandel v. Bradley*, 432 U.S. at 176-77.

Even if *Queensgate* were on point, that would not compel denial of this petition. A summary dismissal does not have the same precedential value for the Supreme Court as does a decision rendered after full briefing and argument. *Metromedia, Inc. v. City of San Diego*, 453

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[1] Respondent tries hard to disavow the conclusions regarding price advertising reached by Pennsylvania's Attorney General and its Liquor Control Board. First, respondent argues that those entities are not really part of Pennsylvania's "government," because they are separate from the Pennsylvania legislature. Brief in Opp. at 5-6. The length to which respondent must stretch to make this untenable argument reveals its understandable concern about these two documents.

Second, respondent repeatedly and mistakenly protests that the Attorney General's Report and the Liquor Board Order cannot be considered by this Court because they were not made part of the record below. Brief in Opp. at 5-6, 6 n.3, 11 n.6. To the contrary, the record below contains a lengthy discussion of the Attorney General's Report and its conclusions. *See* Petition at 5 n.4. Further, both documents may be considered as part of the legislative history of Section 4-498's precursor regulation.

U.S. 490, 500 (1981). "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476-77 n.20 (1979). To the extent that there is any ambiguity concerning the meaning of the summary dismissal in *Queensgate*, then that is another matter that should be clarified by the granting of this petition. *See Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974) (recognizing that three prior summary affirmances had precedential value on the issue at bar, but nonetheless granting the petition so as to "fully explore and treat" the issue, and ultimately disapproving of the prior summary affirmances).

III. THE GOVERNMENT CANNOT HARMONIZE EITHER THE PENNSYLVANIA COURT'S "REASONABLE RELATION" TEST OR ITS UPHOLDING OF SECTION 4-498 WITH THIS COURT'S *CENTRAL HUDSON* TEST

The government incorrectly asserts that this petition need not be granted because there are only "slight differences" between the Pennsylvania Court's "reasonable relation" test—which as applied in these cases is no more than a "rational basis" test—and the intermediate scrutiny of *Central Hudson*. Brief in Opp. at 18. But, in a recent decision ignored by the government, this Court explicitly has "rejected mere rational basis review" in judging restrictions on commercial speech. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993) (*"Discovery Network"*). Further, in two additional decisions that are inexplicably absent from the government's brief, this Court has made plain that *Central Hudson* requires much more than a "rational basis" showing, by emphasizing the heavy burden on the government to come forward with specific evidence and the independent role of the judiciary in reviewing that evidence. *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2086-89 (1994) (*"Ibanez"*);

Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993) ("*Edenfield*").

Nonetheless, the government mistakenly insists that the Pennsylvania Court's decision does not conflict with other cases involving restrictions on alcohol beverage advertising because—regardless of the test applied—they all have upheld the challenged regulation. The government's survey of the cases is wrong because it ignores three decisions that have struck down such restrictions as impermissible under the First Amendment. *Adolph Coors Co. v. Bentsen*, 2 F.3d 355 (10th Cir. 1993), *cert. granted*, 114 S. Ct. 2671 (1994); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227; *Michigan Beer*, 370 N.W. 2d 328.[2]

More importantly, the government's result-driven analysis of the cases is irrelevant because courts must decide each commercial speech case on its own record. If the Pennsylvania Court had applied the appropriate level of scrutiny—intermediate—to the record in these cases, it could not possibly have found that the government satisfied its burden of proof under *Central Hudson* because (i) the government submitted no evidence to show that the banning of price advertising will directly and materially reduce excessive consumption, App., *infra*, 12a, and in fact reached a contrary conlusion in the Attorney General's Report and the Liquor Board Order, *id.* at 51a, 78a, (ii) the government submitted no evidence to demonstrate that its ban is no more restrictive than necessary to achieve its asserted interest, *id.* at 13a, and again reached a contrary conclusion in the Attorney General's Report, *id.* at 57a-58a, (iii) substantial evidence appears in the legislative history that Section 4-498 actually was

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[2] The government mischaracterizes *Michigan Beer* as not having been decided by a state court of last resort. Brief in Opp. at 17. The Michigan Court of Appeals was the court of last resort because the Michigan Supreme Court denied leave to appeal the decision. 424 Mich. 878; *see Matthews v. Huwe*, 269 U.S. 262, 265 (1925).

passed for the improper purpose of putting large beer discounters out of business, *id.* at 89a, 91a, and (iv) the government—which is the exclusive seller of wine and spirits for off-premise consumption—omits its own advertising from the ban.[3]

The government concludes its brief by making one last attempt to square the Pennsylvania Court's unprecedented decision to abandon *Central Hudson* with the conflicting decisions of the other lower courts. According to the government, the lower courts apparently have been disingenuous when purporting to apply *Central Hudson*, because they in fact have been basing their decisions "on the theory that a state's power to totally ban the sale of alcohol includes the lesser power to dampen demand by placing restrictions on advertising." Brief in Opp. at 19-20. As the government notes, that theory is actually a restatement of dictum from *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345-46 (1986) ("*Posadas*"). But that much criticized[4]

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[3] Confronted with the inconsistency in Pennsylvania's statutory scheme, respondent—the entity responsible for enforcing the Liquor Code—suggests, but studiously avoids concluding, that Section 4-498 also might ban price advertising by the Liquor Control Board. Brief in Opp. at 2 n.2. But the "Board" is a defined term in the Liquor Code, Pa. Stat. Ann. tit. 47 § 1-102 (1969 & Supp. 1994), and the Pennsylvania legislature demonstrates in other sections of the Code that it knows how to include the Board in the list of entities banned from certain activities, *see id.* at § 4-493(1) (prohibiting the Board from furnishing alcohol beverages to certain persons), (3) (prohibiting the Board from exchanging alcohol beverages for merchandise), (24) (prohibiting the Board from offering things of value as an inducement to purchase alcohol beverages). In contrast, Section 4-498 does not include the Board among the entities banned from price advertising.

[4] *See, e.g., Posadas*, 478 U.S. at 355 n.4 (Brennan, J., dissenting); Philip B. Kurland, *Posadas de P.R. v. Tourism Co.: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 Sup. Ct. Rev. 1, 12-17; Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627 (May 1990).

dictum has *never* been relied on by any court (including the *Posadas* Court) to supplant application of *Central Hudson*, and it is at odds with this Court's subsequent commercial speech decisions, which emphasize independent judicial review of the government's evidence. *See, e.g., Ibanez*, 114 S. Ct. 2084; *Edenfield*, 113 S. Ct. 1792; *Discovery Network*, 113 S. Ct. 1505. Indeed, this Court recently declined to rule on the basis of the *Posadas* dictum in *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993). Nonetheless, if the government is correct that certain lower courts have adopted *sub silentio* the *Posadas* dictum as the law, then clarification of that dictum's significance provides yet another reason why this petition should be granted.

CONCLUSION

The petition should be granted.

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No. 94-1247 (5)

In the Supreme Court of the United States

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Petitioner,

v.

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

NIGHTTIME CONCEPTS, INC.,
Petitioner,

v.

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On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

ARGUMENT

Petitioners submit this supplemental brief because of the dispositive impact of the Court's recent decision in *44 Liquormart v. Rhode Island*, No. 94-1140 (U.S. May

13, 1996), on the issues presented by this Petition. Under *44 Liquormart*, it is now clear that the Pennsylvania Supreme Court's reliance on the Twenty-first Amendment as the foundation for its analysis was erroneous. It is also clear that Pennsylvania's restriction cannot satisfy the *Central Hudson* * test for restrictions on commercial speech. Therefore, based on *44 Liquormart*, the Petition should be granted and the decision of the Supreme Court of Pennsylvania should be summarily reversed.

As noted in the Petition, the Pennsylvania Court found that a First Amendment challenge to a restriction on price advertising for alcohol beverages was governed primarily by the Twenty-first Amendment. *See* Petition at 8. Accordingly, the Pennsylvania Court discarded the "careful balancing" ordinarily required in First Amendment cases in favor of an unprecedented "reasonable relation" test. *Id.* In *44 Liquormart*, the Court has now unanimously rejected the notion that the Twenty-first Amendment operates to qualify First Amendment rights. Slip op. (Stevens, J.) at 30; slip op. (O'Connor, J.) at 6. In Part VII of the opinion, the Court held that "[t]he Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." Slip op. (Stevens, J.) at 30. Justice O'Connor concurred, finding that "[n]othing in the Amendment's text or history justifies its use to alter the application of the First Amendment." Slip op. (O'Connor, J.) at 6. This resounding rejection of the fundamental premise of the Pennsylvania Court's decision leads to the inescapable conclusion that the Pennsylvania decision should now be reversed.

Reversal, not remand, is the appropriate remedy because *44 Liquormart* is directly on point. *44 Liquormart* involved

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* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

a First Amendment challenge to Rhode Island's ban on price advertising of alcohol beverages. *See* slip op. (Stevens, J.) at 1. The purpose of the ban was to promote temperance by reducing consumption. *See id.* at 17-18. The Court in *44 Liquormart* held that the statute was unconstitutional because Rhode Island failed to satisfy its heavy burden of justifying the ban. *Id.* at 31. The burden imposed on the government is to demonstrate that the restriction directly advances the stated purpose of the statute to a material degree, in a manner no more extensive than necessary. *Id.* at 18-19. Justice Stevens, joined by three other justices, held that Rhode Island failed to submit any evidence to demonstrate that its statute would "*significantly* advance" Rhode Island's interest in promoting temperance. *Id.* at 19 (emphasis in original). In addition, both Justice Stevens in Part V of his opinion and Justice O'Connor in concurrence found that Rhode Island's statute was more extensive than necessary because Rhode Island ignored obvious alternative forms of regulation that would accomplish the goal of promoting temperance without restricting speech—alternatives such as educational programs. *Id.* at 21; slip op. (O'Connor, J.) at 3.

The Pennsylvania statute is nearly identical to the Rhode Island statute, and was also enacted for the purpose of reducing consumption of alcohol beverages. As in *44 Liquormart*, however, the government failed to demonstrate that the statute would directly advance that purpose in a manner no more extensive than necessary. *See* Petition at 20-21. The record here contains even less evidence of the impact of the statute on rates of consumption of alcohol beverages than the *44 Liquormart* record contained. *Id.* at 20. In fact, in the instant case the government presented *no evidence* to demonstrate that the statute caused a decrease in consumption rates and even argued to this Court that "no explicit evidentiary findings are needed." Brief in Opposition to Petition at 12. Moreover, the same obvious, alternative measures

for promoting temperance without restricting speech that were available to Rhode Island were available to the Pennsylvania legislature; yet there is no evidence that the Pennsylvania legislature even considered these options. In sum, the government has completely failed to satisfy its heavy burden. Accordingly, the Court should follow *44 Liquormart* and declare the Pennsylvania statute unconstitutional.

CONCLUSION

The decision in *44 Liquormart* makes plain that the Pennsylvania Court erred in relying on the Twenty-first Amendment to avoid a First Amendment analysis of Pennsylvania's statute. Moreover, the decision in *44 Liquormart* demonstrates that bans on price advertising, such as Pennsylvania's statute, are unconstitutional. The Petition should be granted and the judgment of the Supreme Court of Pennsylvania should be summarily reversed.

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